No. 17-

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

DOUGLAS POPE
POPE & KATCHER
421 West First Avenue, Suite 220
Anchorage, AK 99501

MATTHEW T. FINDLEY
Counsel of Record
EVA R. GARDNER
ASHBURN & MASON, P.C.
1227 West Ninth Avenue, Suite 200
Anchorage, AK 99501
(907) 276-4331
matt@anchorlaw.com

Attorneys for Petitioner

Date: January 2, 2018

277236

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is John Sturgeon.

Respondents are Bert Frost, in his official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon; Andee Sears; Ryan Zinke, Secretary of the Interior; Michael Reynolds, in his official capacity as Acting Director of the National Park Service; The National Park Service; and The United States Department of the Interior.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES v

TABLE OF CITED AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Land Allocation in Alaska 4

B. The Alaska National Interest Lands Conservation Act 6

C. ANILCA's Regulatory History 10

Table of Contents

Page

D. Factual Background 13

E. Procedural History and this Court's Ruling...15

F. Proceedings on Remand.....17

REASONS FOR GRANTING THE PETITION.....21

I. The Petition Raises a Question of Exceptional Importance for the People of Alaska 21

II. The Ninth Circuit's Ruling Conflicts with this Court's Decisions.....27

A. The Ninth Circuit indefensibly expanded the reserved waters rights doctrine.....27

B. NPS's remaining alternative arguments are meritless 33

CONCLUSION 35

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 2, 2017 ..... 1a

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 16, 2014 ..... 24a

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 6, 2014 ..... 26a

APPENDIX D — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED OCTOBER 30, 2013 ..... 58a

APPENDIX E — 16 U.S.C. § 3103 ..... 82a

APPENDIX F — 36 C.F.R. § 1.2 ..... 85a

APPENDIX G — 36 C.F.R. § 2.17 ..... 88a

TABLE OF CITED AUTHORITIES

Page

CASES

Alaska v. Arctic Maid,
366 U.S. 199 (1961) 23

Alaska v. Babbitt (Katie John I),
72 F.3d 698 (9th Cir. 1995) 18, 19

Alaska v. United States,
201 F.3d 1154 (9th Cir. 2000) 14

Alaska v. United States,
545 U.S. 75 (2005) 23, 32

Arizona v. California,
373 U.S. 546 (1963) 31

Bulova Watch Co. v. United States,
365 U.S. 753 (1961) 33

City of Angoon v. Hodel,
803 F.2d 1016 (9th Cir. 1986) 18, 28

City of Angoon v. Marsh,
749 F.2d 1413 (9th Cir. 1984) 6

Cited Authorities

Page

Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 27

Gibbons v. Ogden, 22 U.S. 1 (1824) 22

Gregory v. Ashcroft, 501 U.S. 452 (1991) 22, 28

John v. United States (Katie John II), 247 F.3d 1032 (9th Cir. 2001) 18

John v. United States (Katie John III), 720 F.3d 1214 (9th Cir. 2013) 18, 20, 31

Martin v. Lessee of Waddell, 16 Pet. 367 (1842) 2

PPL Montana, LLC v. Montana, 565 U.S. 576 (2012) 2, 22

Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996) 23

Rapanos v. United States, 547 U.S. 715 (2006) 28

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 28

Page

Sturgeon v. Frost,
136 S. Ct. 1061 (2016) ..... *passim*

Tarrant Reg'l Water Dist. v. Herrmann,
569 U.S. 614 (2013) 22

Totemoff v. State,
905 P.2d 954 (Alaska 1995) 29

Trustees for Alaska v. State,
736 P.2d 324 (Alaska 1987) 21

United States v. Alaska,
422 U.S. 184 (1975) 23

United States v. Alaska,
503 U.S. 569 (1992) 23

United States v. Alaska,
521 U.S. 1 (1997) 23

United States v. California,
436 U.S. 32 (1978) 2, 23

United States v. New Mexico,
438 U.S. 696 (1978) 24, 31, 32

United States v. Virginia Elec. & Power Co.,
365 U.S. 624 (1961) 28

Cited Authorities

Page

Utah Div. of State Lands v. United States,
482 U.S. 193 (1987) 2

Utility Air Regulatory Group v. EPA,
134 S. Ct. 2427 (2014) 32

STATUTES AND OTHER AUTHORITIES

16 U.S.C. § 17j-2 32

16 U.S.C. § 45f(b)(1) 26

16 U.S.C. § 90 26

16 U.S.C. § 121 26

16 U.S.C. § 251n(a)(1) 29

16 U.S.C. § 410bb(b)(1) 26

16 U.S.C. § 410ff-1(a) 26

16 U.S.C. § 410hh 6

16 U.S.C. § 410hh(10) 7

16 U.S.C. § 410jj-3(c) 26

16 U.S.C. § 410mm-2(b) 26

Cited Authorities

Page

16 U.S.C. § 460q-2(a) 26

16 U.S.C. § 460z-6(a) 26

16 U.S.C. § 460aa-12 26-27

16 U.S.C. § 460bb-3(a) 26

16 U.S.C. § 460kk(c)(1) 27

16 U.S.C. § 3101 6

16 U.S.C. § 3101(b) 16

16 U.S.C. § 3101(d) 6, 19

16 U.S.C. § 3102(1) 8

16 U.S.C. § 3102(2) 8

16 U.S.C. § 3102(3) 8, 27

16 U.S.C. § 3102(3)(A) 29

16 U.S.C. § 3102(4) 8

16 U.S.C. § 3103(c) 8, 15, 32, 34

16 U.S.C. § 3111(2) 16

Cited Authorities

Page

16 U.S.C. § 3111(4) 30

16 U.S.C. § 3147(b)(5) 16

16 U.S.C. § 3192 ..... 32, 34

16 U.S.C. § 3197(b)(7) 34

16 U.S.C. § 3202(a)-(b) 30

16 U.S.C. § 3207(2) 29

16 U.S.C. § 3111(2) 16

28 U.S.C. § 1254(a) 1

43 U.S.C. § 1311(a) 14, 29, 33

43 U.S.C. § 1314(a) 18

43 U.S.C. § 1601(a) 5

43 U.S.C. § 1607 5

43 U.S.C. § 1616(d)(2) 5

54 U.S.C. § 100101(a) 24

54 U.S.C. § 100751 ..... 15, 16, 33

Cited Authorities

Page

36 C.F.R. § 1.2 15

36 C.F.R. § 1.2(a)(3) 13, 15

36 C.F.R. § 1.2(b) 11, 13

36 C.F.R. § 1.4 12

36 C.F.R. § 2.3 24

36 C.F.R. § 2.14 24

36 C.F.R. § 2.17(e) 13, 15

125 Cong. Rec. 11,158 (1979) 8

125 Cong. Rec. 9905 (1979) 9

126 Cong. Rec. 21,882 (1980) 10

46 Fed. Reg. 31836 (June 17, 1981) 11

48 Fed. Reg. 30275 (June 30, 1983) 12

52 Fed. Reg. 35239 (Sept. 18, 1987) 12

61 Fed. Reg. 35136 (July 5, 1996) 13

Alaska Const. Art. VIII, § 1 5

Cited Authorities

Page

Alaska Const. Art. VIII, § 2 23

Alaska Const. Art. VIII, § 3 22

Alaska Const. Art. VIII, § 13 22

H. Con. Res. 452, 96th Cong. (1980) 10

Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978) 5

Public Land Order No. 5653, 43 Fed. Reg. 59,756 (Dec. 21, 1978) 5-6

Public Land Orders 5696-5711, 45 Fed. Reg. 9562 (Feb. 12, 1980) 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Sturgeon submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 872 F.3d 927 and is reproduced in the Appendix ("App.") at 1a-23a. The Ninth Circuit's earlier opinion is reported at 768 F.3d 1066 and is reproduced at 26a-57a. The Ninth Circuit's earlier order denying rehearing en banc is unreported and is reproduced at App. 24a-25a. This Court's opinion vacating the Ninth Circuit's earlier opinion is reported at 136 S. Ct. 1061. The opinion of the United States District Court for the District of Alaska is available at 2013 WL 5888230 and is reproduced at App. 58a-81a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on October 2, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App. 82a-88a.

INTRODUCTION

State ownership of submerged lands is an "essential attribute" of sovereignty. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). Federalism thus depends in no small measure on the understanding that the States "'hold the absolute right to all their navigable waters and the soils under them,' subject only to rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012) (quoting *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842)). That ownership extends not only to navigable waters themselves, but also to the resources located within them. *United States v. California*, 436 U.S. 32, 37 (1978).

This dispute implicates these important concerns. It "touch[es] on vital issues of state sovereignty, on the one hand, and federal authority, on the other." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016). Previously, this Court preserved Alaska's sovereignty by holding that the Alaska National Interest Lands Conservation Act ("ANILCA") barred the National Park Service ("NPS") "from regulating 'non-public' land in Alaska as if that land were owned by the Federal Government." *Id.* at 1068. But on remand the Ninth Circuit sidestepped that holding by concluding that the Nation River is actually "public land" because, given its navigability, the Unites States holds a "reserved water right." App. 9a-19a.

This is a crushing blow to Alaska's sovereignty. By holding that the United States has a title interest in all Alaska waterways located within federal Conservation System Units ("CSUs"), the Ninth Circuit has placed a

significant percentage of Alaska's vast navigable waters in federal receivership. NPS now has nearly limitless power over these non-federal waters. And, because reserved water rights apply to all waters appurtenant to federal land, waters far outside CSUs could now be transformed into public lands too. Converting non-federal waters into public lands impacts surrounding State, Native, and private uplands because NPS may issue regulations to protect the newly "public" waters. Such regulation, in turn, would severely restrict Alaskans from beneficially using their natural resources.

But, unlike the previous question the Court decided, this expansion of federal authority is not limited to Alaska. Many federal statutes, including those creating national parks, define public lands in the same manner as ANILCA. If the Ninth Circuit's ruling stands, the United States may claim it has reserved water rights in any standing water, wetland, or groundwater throughout the West, converting them into public lands subject to plenary federal control, all without paying compensation. This is an urgent issue of state sovereignty.

Review is all the more warranted because the Ninth Circuit's ruling is indefensible. A reserved water right does not create a title interest, and concluding that ANILCA did so here cannot overcome the clear statement rule. Even if it did, the hovercraft ban far exceeds the scope of that right. It defies reason, history, and precedent to conclude that the existence of an implied reserved water right can nullify traditional state control over navigable waters and the resources in them by rendering those waters "public land." Ultimately, NPS's arguments all run into the same obstacle. As this Court held, ANILCA's

whole point was to keep NPS from imposing precisely this type of restriction on non-federal land. The Court should make this clear once and for all.

STATEMENT OF THE CASE

A. Land Allocation in Alaska

Alaska contains 586,000 square miles of land and 95,000 square miles of water. It is one-fifth the size of the lower 48 states, 488 times larger than Rhode Island, and two and a half times bigger than Texas. Alaska contains more land than the next three largest states in the United States combined and more than twice the water of any other state. At the same time, Alaska supports a total population of only 710,231 people and most of it is inaccessible by road. Indeed, Alaska's average population density is only 1.2 persons per square mile. If Manhattan had the same population density as Alaska, 28 people would live there. Fairly allocating land and resources in this vast landscape and ensuring the economic well-being of its people have been vitally important issues since Alaska joined the Union in 1959.

Before statehood, the United States owned 98% of Alaska's land and waters. *Sturgeon*, 136 S. Ct. at 1065. To ensure the new state's economic viability, Congress granted 103,350,000 acres of land to Alaska (or 28% of its overall area) and required that any further conveyance of this land must reserve mineral and other rights to the State. *Id.* Congress also granted Alaska "'title to and ownership of the lands beneath navigable waters' within the State, in addition to 'the natural resources within such lands and waters,' including 'the right and power

to manage, administer, lease, develop, and use the said lands and natural resources.'" *Id.* (quoting 43 U.S.C. § 1311(a)). Because of these grants, Alaska could "fulfill its state policy 'to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.'" *Id.* (quoting Alaska Const. Art. VIII, § 1).

Statehood, however, did not resolve the land claims of Alaska Natives. Congress resolved these issues in 1971 by passing the Alaska Native Claims Settlement Act ("ANCSA") to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). ANCSA extinguished Alaska Natives' aboriginal land claims in exchange for $960 million, allowing Alaska Native-owned corporations to select 40 million acres of federal land in Alaska. *Sturgeon*, 136 S. Ct. at 1065. Congress intended for the Native Corporations to use these lands and assets for economic development that would benefit the Native peoples of Alaska. 43 U.S.C. § 1607.

ANCSA also addressed land allocation between the State of Alaska and the United States by directing the Secretary of the Interior to withdraw up to 80 million acres of federal land for potential inclusion as "units of the National Park System[]." 43 U.S.C. § 1616(d)(2). But this process was not completed because the withdrawals never received the required Congressional approval. *Sturgeon*, 136 S. Ct. at 1065. In response, the Carter administration withdrew over 100 million acres of land, designating over 56 million acres of it as national monuments. Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978) (Admiralty Island National Monument); Public Land Order No. 5653,

43 Fed. Reg. 59,756 (Dec. 21, 1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9562 (Feb. 12, 1980).

B. The Alaska National Interest Lands Conservation Act

Alaskans protested the Carter withdrawals because they subjected these lands to intrusive federal regulation. *Sturgeon*, 136 S. Ct. at 1065-66. Congress passed ANILCA to address their concerns. 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.* ANILCA had two goals: "First, to provide 'sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska.' And second, to provide 'adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 136 S. Ct. at 1066 (quoting 16 U.S.C. § 3101(d) (citation omitted)); *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984) ("Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use.").

ANILCA affected 104 million acres of Alaskan land; it expanded the National Park System by over 43 million acres, creating ten new national parks, preserves, and monuments and tripling the nation's federal wilderness preservation acreage. *Sturgeon*, 136 S. Ct. at 1066; 16 U.S.C. § 410hh. It also rescinded the Carter designations. *Id.* ANILCA divided all these federal preservation lands into CSUs. *Sturgeon*, 136 S. Ct. at 1066. As part of this Park System expansion, ANILCA created the Yukon-Charley Rivers National Preserve ("Yukon-Charley") as

a CSU in east-central Alaska, west of the village of Eagle. 16 U.S.C. § 410hh(10).

Essential to the compromise ANILCA embodied was Congress's assurance that the millions of acres of land previously set aside for the economic and social needs of the Alaskan people would not be subject to federal control and management. This was an acute concern because CSU boundaries were drawn to follow natural features in the landscape, rather than property lines. As a consequence, the new CSUs encompassed within their boundaries over 18 million acres of State, Native Corporation, and private land. *Sturgeon*, 136 S. Ct. at 1066.

To ensure that these lands would remain available for the economic and social needs of Alaskans despite being newly surrounded by federal CSUs, ANILCA included an express assurance that these lands would be free from federal control:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Congress defined key terms such as "land," "federal land," and "public lands." "Land" means "lands, waters, and interests therein." 16 U.S.C. § 3102(1). "Federal land" means "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). And "public lands" means "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. *Id.* § 3102(3). In addition, the statute defines "conservation system unit" to include the NPS units addressed by ANILCA. *Id.* § 3102(4). Read together with these definitions, Section 103(c) provides that "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

Section 103(c)'s purpose was apparent from the start of the legislative process. It began as an amendment to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling). "Those private lands, and those public lands owned by the State of Alaska," accordingly, "are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (Nov. 14, 1979).

Arizona Congressman Morris Udall, ANILCA's primary sponsor in the House of Representatives, furtner explained that:

> this bill... is a direct out-growth of the Alaska Native Claims Settlement Act of 1971.... Thus, it is important to recall the relationship between the conservation system units ... and the lands which the Native peoples of Alaska have received and will receive pursuant to the Alaska Native Claims Settlement Act in return for the extinguishment of their claims based on aboriginal title. We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units .... I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

125 Cong. Rec. 9905 (1979).

Senator Ted Stevens of Alaska agreed:

> The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the

> corporations have under this act, the Alaska Native Claims Settlement Act, or any other law. It is not our intent, by the inclusion of Native lands within the exterior boundaries of conservation system units, to imply that such inclusion is a revocation of land selections validly filed pursuant to any provision of the Alaska Native Claims Settlement Act. The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act. We intend to have these assurances translated into practice by the administrative agencies.

126 Cong. Rec. 21,882 (1980).

On that understanding, Section 103(c) was added to the final version of ANILCA via concurrent resolution. H. Con. Res. 452, 96th Cong. (1980). The amendment was made to firmly establish "that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30,498(1980) (statement of Rep. Udall).

C. ANILCA's Regulatory History

For sixteen years following the statute's enactment, NPS interpreted ANILCA to deny it authority to regulate State, Native Corporation, and private lands physically located within CSUs. In 1981, NPS issued regulations to "provide interim guidance on public uses of National Park System units in Alaska, including units established

by the Alaska National Interest Lands Conservation Act." 46 Fed. Reg. 31836 (June 17, 1981). The preamble explained that:

> Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally owned lands within park area boundaries. Consistent with the statute and the explanatory legislative history ... § 13.2(e) restricts the applicability of these regulations to 'federally owned' lands (defined to mean all land interests held by the Federal government including unconveyed Native selections) within park area boundaries .... These regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries.

Id. at 31843.

As promulgated in 1983, 36 C.F.R. § 1.2(b) provided that:

> The regulations contained in Parts 1 through 7 of this chapter are not applicable on privately owned lands and waters (including Indian lands and waters owned individually or tribally) within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States.

48 Fed. Reg. 30275 (June 30, 1983).

36 C.F.R. § 1.4 defined "legislative jurisdiction" to mean "lands and waters under the exclusive or concurrent jurisdiction of the United States." 48 Fed. Reg. at 30261. NPS added that the regulation was "intended to also include state inholdings that are under the legislative jurisdiction of the United States." *Id.*

Confusion nonetheless persisted as to the regulatory status of State-owned lands and the meaning of the phrase "legislative jurisdiction of the United States." In 1987, NPS resolved the confusion by revising Section 1.2(b). As revised, the regulation provided:

> Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area.

52 Fed. Reg. 35239 (Sept. 18, 1987).

NPS resolved the question as to State-owned lands by broadening the regulation to cover all "non-federally owned lands and waters or on Indian lands and waters." As to the meaning of the "legislative jurisdiction of the United States," NPS explained that "when applied to non-federal lands, [it] means lands and waters over which the

State has ceded some or all of its legislative authority to the United States." *Id.* at 35238.

NPS reversed course in 1996, extending all of its regulations to non-federal lands in Alaska. To accomplish this, NPS issued 36 C.F.R. § 1.2(a)(3), which provides that NPS regulations apply to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters ... *without regard to the ownership of submerged lands, tidelands, or lowlands.*" 61 Fed. Reg. 35136 (July 5, 1996) (emphasis added). NPS revised 36 C.F.R. § 1.2(b) to provide that the "regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, *except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.*" *Id.* (emphasis added). Among the NPS regulations made applicable to State-owned lands is 36 C.F.R. § 2.17(e), which bans the use of hovercraft within NPS boundaries.

D. Factual Background

John Sturgeon has hunted moose along the Nation River in Alaska for nearly 40 years. *Sturgeon*, 136 S. Ct. at 1064. From 1990 until the events giving rise to this suit, he traveled by means of a small personal hovercraft, which allowed him to float over the river's shallow, difficult portions to his preferred hunting grounds. App. 18a. Part of Mr. Sturgeon's route along the Nation River lies within the Yukon-Charley, though the grounds themselves are not. *Sturgeon*, 136 S. Ct. at 1064.

Because the Nation River is navigable, *Alaska v. United States*, 201 F.3d 1154, 1158 (9th Cir. 2000), the State of Alaska holds title to the riverbed and "'the natural resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting 43 U.S.C. §1311(a)). Under Alaska law, Mr. Sturgeon may use his hovercraft on the Nation River. *Id.* at 1064.

In the fall of 2007, Mr. Sturgeon entered the Nation River from the Yukon River by hovercraft en route to his usual hunting grounds. *Id.* at 1066. Approximately two miles upriver, while stopped on a gravel bar to repair the hovercraft's steering cable, he was approached by Park Service rangers. *Id.* at 1066-67. They informed him that it was a crime to operate the hovercraft in the Yukon-Charley. *Id.* Mr. Sturgeon explained that the prohibition did not apply because the hovercraft was on a State-owned waterway. *Id.* at 1067. The rangers nevertheless ordered him to remove his hovercraft from within the boundaries of the Yukon-Charley. *Id.*

After returning from his thwarted hunting trip, Mr. Sturgeon communicated with NPS Special Agent Andee Sears in Anchorage, Alaska. App. 72a. She acknowledged that the State owned the Nation River's submerged lands, but insisted that hovercraft use within the Yukon-Charley was a federal crime, even on navigable waters and State-owned submerged lands, and would subject Mr. Sturgeon to criminal citation. App. 31a. Fearing federal prosecution, Mr. Sturgeon stopped using his hovercraft in the Yukon-Charley. *Sturgeon*, 136 S. Ct. at 1067.

E. Procedural History and this Court's Ruling

On September 14, 2011, Mr. Sturgeon filed suit in the U.S. District Court for the District of Alaska to, *inter alia*, enjoin NPS from applying its hovercraft regulation to the Nation River. App. 59a; 36 C.F.R. §§ 1.2(a)(3), 2.17(e). He argued that ANILCA prohibited NPS from enforcing its hovercraft ban on the Nation River because: (1) the Nation River was a "land[] ... conveyed to the State," because the Alaska Statehood Act and the Submerged Lands Act gave Alaska ownership of the submerged lands beneath (and the resources within) the navigable waters in Alaska; and (2) the hovercraft ban was a "regulation[] applicable solely to public lands within such units" as it applied "solely" by virtue of NPS's authority to manage national parks. App. 59a-60a.

The district court granted summary judgment to NPS. App. 75a-81a. The court held that 54 U.S.C. § 100751 and its corresponding regulation, 36 C.F.R. § 1.2, gave NPS the authority to ban the use of hovercraft on the Nation River because the river's bed and waters were lands "within the boundaries" of an ANILCA conversation system unit (the Yukon-Charley). App. 76a. Section 103(c), the court concluded, did not limit that authority. Even assuming that the Nation River had been "conveyed" to the State and was not a "public land," 16 U.S.C. § 3103(c), the hovercraft regulation was not applicable "solely" to public lands within CSUs; it was of "general application across the entirety of the NPS." App. 75a-81a. ANILCA thus did not prohibit application of the NPS hovercraft regulation to activities on the Nation River.

The Ninth Circuit affirmed. It held that because the hovercraft ban "applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks," it is not a "'regulation[] applicable *solely* to public lands within [CSUs].'" App. 49a (quoting 16 U.S.C. § 3103(c)). Accordingly, "even assuming (without deciding) that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue." *Id.* ANILCA did not override NPS authority to regulate "'boating and other activities on or relating to water located within [CSUs].'" *Id.* (quoting 54 U.S.C. § 100751).

This Court granted certiorari and vacated the Ninth Circuit's judgment. The Court found the Ninth Circuit's reading of Section 103(c) to be "inconsistent with both the text and context of the statute as a whole." *Sturgeon*, 136 S. Ct. at 1070. Under such an interpretation, NPS "may apply nationally applicable regulations to 'non-public' lands within the boundaries of conservation system units in Alaska, but it may not apply Alaska-specific regulations to those lands." *Id.* That was a "surprising conclusion" because "ANILCA repeatedly recognizes that Alaska is different—from its 'unrivaled scenic and geological values,' to the 'unique' situation of its 'rural residents dependent on subsistence uses,' to 'the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.'" *Id.* (quoting 16 U.S.C. §§ 3101(b), 3111(2), 3147(b)(5)). The Ninth Circuit's interpretation, in sum, could not be reconciled with the fact that "Alaska is often the exception, not the rule." *Id.* at 1071.

The Court acknowledged that NPS had made other arguments in defense of its regulation, which the parties had briefed and argued. *Id.* at 1072. First, the parties disputed "whether the Nation River qualifies as 'public land' for purposes of ANILCA." *Id.* Second, the parties disputed "whether the Park Service has authority under Section 100751(b) to regulate Sturgeon's activities on the Nation River, even if the river is not 'public' land, or whether—as Sturgeon argues—any such authority is limited by ANILCA." *Id.* And, third, the parties disputed whether NPS "has authority under ANILCA over both 'public' and 'non-public' lands within the boundaries of [CSUs] in Alaska, to the extent a regulation is written to apply specifically to both types of land." *Id.*

The Court remanded. First, the erroneous interpretation of Section 103(c) was "the sole basis for the disposition of this case by the Court of Appeals." *Id.* at 1071. Second, because the parties' other disputes "touch[ed] on vital issues of state sovereignty, on the one hand, and federal authority, on the other," they "should be addressed by the lower courts in the first instance." *Id.* at 1072.

F. Proceedings on Remand

The Ninth Circuit affirmed. This time, the court held that the Nation River is "public land" under ANILCA because "the United States has an implied reservation of water rights" in it. App. 19a. Therefore, Section 103(c)'s ban on extending regulations "applicable solely to public lands" to non-federal Alaska lands was not an obstacle to prohibiting hovercraft.

The Ninth Circuit pointed to the fact that "[u]nder the Submerged Lands Act, '[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of [submerged] lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.'" App. 11a (quoting 43 U.S.C. § 1314(a)). But the court also recognized that a "navigational servitude is not 'public land' within the meaning of ANILCA' because 'the United States does not hold title to the ... servitude.'" *Id* (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986)). That was because, among other reasons, "Congress did not intend 'to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters' when it enacted ANILCA." *Id.* (quoting *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 703 (9th Cir. 1995)).

The Ninth Circuit nevertheless concluded that the Nation River is "public land" under ANILCA pursuant to the "reserved water rights doctrine." App. 17a. To reach that conclusion, it relied on circuit precedent known as the *Katie John* decisions. App. 11a-13a; (discussing *Katie John I*, 72 F.3d 698; *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001); *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013)). In those decisions, the Ninth Circuit held that "public lands," in the context of ANILCA's Title VIII subsistence provisions, included navigable waters where the federal government has reserved water rights. *Katie John I*, 72 F.3d at 703-04. This conclusion was mainly driven by the Ninth Circuit's desire to give effect to ANILCA's subsistence provisions and to act in accordance with what it saw as clear congressional intent to protect subsistence fishing by rural residents. *Katie John I*, 72 F.3d at 702 n.9; *Katie*

John II, 247 F.3d at 1037 (Tallman, J., concurring in the judgment).

Applying the reserved water rights doctrine, the Ninth Circuit held that "'[t]he United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes,' including ANILCA, and thereby has 'implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations.'" App. 12a (quoting *Katie John I*, 72 F.3d at 703 & n.10). "This reservation of water rights gave the United States 'interests in some navigable waters'" and, as a result, "ANILCA's 'definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.'" *Id.* (quoting *Katie John I*, 72 F.3d at 703).

The Ninth Circuit held that the *Katie John* cases foreclosed Mr. Sturgeon's challenge to NPS's hovercraft ban. App. 13a-18a. While that line of precedent had been applied in markedly different circumstances, the Ninth Circuit found no basis to draw a distinction here. Pointing to "ANILCA's purpose of 'provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska,'" App. 14a (quoting 16 U.S.C. § 3101(d)), and to the pre-ANILCA steps the Carter Administration took to reserve the Yukon-Charley for environmental purposes, the court held that the hovercraft ban was needed to accomplish the purpose of the reservation, App. 14a-16a. While conceding that "'[r]eserved water rights are not a "title" interest,'" the Ninth Circuit found that true only "in a narrow, technical sense" because the "word 'title'

has many meanings." App. 16a-17a. "Thus, 'title' to an 'interest' in water almost certainly means a vested interest in the water, such as a reserved water right." App. 17a.

Last, the court disagreed that the ban exceeds whatever reserved rights the United States holds, even though the use of hovercraft does not jeopardize the Nation River's water level or navigability, or otherwise compromise any interest the United States might hold in it. App. 17a-18a. In the Ninth Circuit's view, NPS may seize control of "'all bodies of water on which the United States' reserved rights *could at some point* be enforced—*i.e.*, those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue.'" App. 18a (quoting *Katie John III*, 720 F.3d at 1231). "Here, one of the reservation's primary purposes is to protect fish. The diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right." *Id.*

Besides writing the majority opinion, Judge Nguyen issued a concurrence that Judge Nelson joined. App. 20a-23a. She agreed the panel was "bound by [its] *Katie John* decisions to analyze this case under the reserved water doctrine." App. 20a. However, that was "unfortunate" because "[a] reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose" and this case has "nothing to do with that." *Id.* Judge Nguyen instead would have upheld the NPS hovercraft ban under the federal government's power to "regulate navigation on navigable waters" under the Commerce Clause, *id.*, even though Congress had declined to exercise that power in enacting ANILCA, App. 11a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

I. The Petition Raises a Question of Exceptional Importance for the People of Alaska.

In previously granting review, the Court correctly recognized that this case raises important issues. Indeed, it is difficult to conceive of an issue of greater importance to the people of Alaska than the one presented here. This case concerns the regulatory disposition of more than 18 million acres of Alaskan land. Perhaps more than any other State, Alaska depends on the beneficial use of its land for "economic and social well-being." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Yet if the Ninth Circuit's judgment is upheld, the ability of Alaskans to productively use their natural resources will be subject to the plenary control of NPS, which prefers to reserve the Alaska wilderness strictly for conservation purposes. As a result, it is likely that the developmental potential of this land will be unrealized.

The ramifications of this case for the Alaskan people were a compelling basis for granting review last time, and the basis for granting review is no less compelling now. If anything, the case for certiorari is even stronger here. Last time, the question before the Court was purely statutory and limited to Alaska. *Sturgeon*, 136 S. Ct. at 1068-72. This case again calls on the Court to interpret ANILCA; ultimately, the Ninth Circuit held on remand

that the Nation River is "public land" within the meaning of ANILCA. But because "only 'lands, waters, and interests therein' to which the United States has '*title*' are considered 'public' land" under the statute, *Sturgeon*, 136 S. Ct. at 1067 (emphasis added), the Ninth Circuit's ruling that United States holds title to the Nation River, and potentially other navigable rivers in States across the West, raises the stakes of this dispute considerably.

As this Court has often explained, "ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water is an essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013). By virtue of the Equal Footing doctrine, all States (including Alaska) have an "absolute right" to their waters, *PPL Montana*, 569 U.S. at 590, under which they hold "title to the navigable waters and their beds in trust for the public," *id.* at 604. Alaska's Constitution thus requires its waters to be reserved "to the people for common" and "beneficial uses." Alaska Const. Art. VIII, §§ 3, 13.

To be sure, the United States possesses some power over navigable waters so that it may, for example, control interstate commerce. *See generally Gibbons v. Ogden*, 22 U.S. 1 (1824). But such power represents a reservation of narrowly-defined rights, *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991), and an agency's exercise of that authority must be pursuant to an express congressional command. Otherwise, control over water belongs to the States.

Nowhere is this bedrock principle more important than in Alaska. Alaska is home to over 40% of the nation's

surface waters. Its 12,000 rivers, millions of lakes, and innumerable creeks and ponds add up to nearly 95,000 square miles of water. Control over the resources in these waters, particularly salmon, was the primary driving force behind Alaska Statehood. *Pullen v. Ulmer*, 923 P.2d 54, 57 n.5 (Alaska 1996). Because much of Alaska is inaccessible by road, moreover, Alaska's navigable waters are essential to the transportation of people and goods throughout the State, rendering them indispensable to the survival and prosperity of many Alaskans. That is why the State must "provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." Alaska Const. Art. VIII, § 2.

But this is not news to the Court, which has long been concerned with Alaska's sovereignty over its waters. Shortly after Alaska achieved statehood, this Court heard a case on Alaska's ability to tax commercial fishing in its (formerly territorial) waters "because of the importance of the ruling to the new State of Alaska." *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961). Since then, this Court has consistently granted review of controversies between Alaska and the United States over the State's authority to deploy its natural resources—especially its submerged lands—for the beneficial use of Alaska's citizens. *See, e.g.*, *United States v. Alaska*, 422 U.S. 184 (1975); *United States v. Alaska*, 503 U.S. 569 (1992); *United States v. Alaska*, 521 U.S. 1 (1997); *Alaska v. United States*, 545 U.S. 75 (2005).

As the Court recognized in previously reviewing this case, the Ninth Circuit's ruling implicates these concerns. The Ninth Circuit held that NPS may pervasively regulate most of Alaska's navigable waters flowing through CSUs

as "public lands." That means NPS can impose *any* restriction that it believes will "conserve the scenery, natural and historic objects, and wild life." 54 U.S.C. § 100101(a). In practice, NPS wields this vast authority to restrict a broad array of activities, including fishing, swimming, boating, water skiing, and water sanitation. 36 C.F.R. §§ 2.3, 2.14; *id.* at Part 3. From a state sovereignty perspective, this is untenable. As remade by the Ninth Circuit, the reserved water rights doctrine is a jurisdictional grant of federal authority instead of functioning (like it has historically) as a narrow exception meant to accommodate a federal interest in the right to use (or prevent use of) a certain volume of water. The Ninth Circuit should not be allowed to transform the reserved water rights doctrine into a vehicle for expanding federal control over State waterways.

Worse still, the Ninth Circuit dramatically lowered the bar for asserting reserved water rights in the first place. Under this Court's decisions, each assertion of a reserved water right has required "careful examination" of "both the asserted water right and the specific purpose for which the land was reserved" to determine whether "without the water the purposes of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700-01 (1978). But in the Ninth Circuit, virtually any federal regulatory policy can now serve as the justification for asserting a reserved water right.

This case proves the point. The Ninth Circuit should have engaged in a "careful examination" to evaluate if Congress, in ANILCA, reserved specific quantities of water based on particular environmental concerns. Instead, the court assumed that because environmental

preservation is one of ANILCA's goals, and because waterways can affect neighboring ecosystems, NPS can claim a reserved water right for any nonspecific environmental purpose it wishes. The result is an open door for NPS and other agencies to broadly wield reserved water rights in Alaska, and across the West, to render these "public lands" off limits to the public in the name of environmental protection.

This amounts to an unprecedented takeover of non-federal waterways. 278,000 square miles—almost half of Alaska's land mass—are federally reserved. ANILCA's CSUs contain over 43,000 miles of river, many of them navigable, and over 5,100 square miles of lakes. Many of these rivers and lakes overlay Native Corporation land. If this ruling stands, the United States will merely need to assert reserved water rights to convert any of these non-federal waterways into "public land."

And this likely *understates* the scope of the federal takeover given that the doctrine applies to "appurtenant water," not just non-federal waterways located within the boundaries of federally-reserved land. *Cappaert*, 426 U.S. at 138. Rivers are fed by streams and lakes, and their composition is affected by wetlands and groundwater. The decision below thus invites the NPS to assert jurisdiction over State, Native corporation, and private lakes, streams, wetlands, and groundwater based on some connection—however remote—to units of the National Park System.

In *Cappaert*, in fact, the United States successfully claimed reserved water rights in groundwater on private land two-and-a-half miles outside Devil's Hole National Monument and, as a result, was able to regulate how these

private landowners accessed their own groundwater. At least there, however, federal authority was restricted to regulating private use in order to maintain a specific water level within the monument needed to protect a rare and endangered fish. *Id.* at 140-41. The reserved water rights were appropriately limited, in other words, to the water necessary to fulfill the specific purpose of the Devil's Hole reservation—preservation of the pool where the rare fish lived. Unlike here, the groundwater did not otherwise become public land subject to unfettered NPS control.

Finally, while this is currently a serious problem for Alaskans, it will spread soon enough. ANILCA's definition of "land" to include "lands, waters, and interests therein" is not unique. The identical definition appears in numerous federal land and park-enabling statutes within the Ninth Circuit. For example, the enabling statute for the Golden Gate National Recreation Area authorizes the Secretary of the Interior to "administer the lands, waters and interests therein acquired for the recreation area." 16 U.S.C. § 460bb-3(a). Likewise, the statute establishing Crater Lake National Park in Oregon provides that "[t]he boundary of the park shall encompass the lands, waters, and interests therein" within the area shown on the park map. 16 U.S.C. 121.[1] Under the Ninth Circuit's expansion

1. There are myriad examples. *See, e.g.*, 16 U.S.C. § 45f(b)(1) (Sequoia National Park); *id.* § 90 (North Cascades National Park); *id.* § 228b(a) (Grand Canyon National Park); *id.* § 410bb(b)(1) (Klondike Gold Rush National Historic Park); *id.* § 410ff-1(a) (Channel Islands National Park); *id.* § 410jj-3(c) (Kalaupapa National Historical Park); *id.* § 410mm-2(b) (Great Basin National Park); *id.* § 459c-7 (Point Reyes National Seashore); *id.* § 460q-2(a) (Whiskeytown-Shasta-Trinity National Recreation Area); *id.* § 460z-6(a) (Oregon Dunes National Recreation Area) *id.* § 460aa-

of the federal reserved water rights doctrine, the door is open under all of these statutes for the United States to claim reserved water rights as "interests therein" and seize control over the vast non-federal waters located throughout the West. For all these reasons, this important issue warrants the Court's review.

II. The Ninth Circuit's Ruling Conflicts with this Court's Decisions.

A. The Ninth Circuit indefensibly expanded the reserved waters rights doctrine.

ANILCA defines public land in terms of what the *federal government owns*—unless "title" to land is held by the United States, it is not "public land" under ANILCA. 16 U.S.C. § 3102(3). The Ninth Circuit nevertheless held that the federal government's interest in the Nation River by virtue of a "reserved water right" rendered this waterway and the land submerged beneath it "public land" within the meaning of ANILCA. App. 19a. That is incorrect for several reasons.

First, reserved water rights do not confer "title"—they confer a non-possessory use right. *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right" in the water itself.). NPS previously conceded as much. *See* Brief of Respondent at 27, *Sturgeon v. Frost*, No, 14-1209 (U.S. Dec. 16, 2015). Whatever "interest" a reserved water right creates, App. 12a, it neither creates nor approximates a title interest.

---

12 (Sawtooth National Recreation Area); *id.* § 460kk(c)(1) (Santa Monica Mountains National Recreation Area).

Unlike mineral rights, for example, a reserved water right is not an alienable property "interest." Nor is it even an easement. Reserved water rights are a reservation of sovereign power that, like a navigational servitude, is not an interest that transfers title. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce"); *City of Angoon*, 803 F.2d at 1027 n.6. In short, even if the United States held reserved water rights in all of Alaska's navigable waters for any purpose (which it does not), those rights still would not render the Nation River or any other navigable Alaska waterway "public land" under ANILCA.

Second, the assertion that the United States may take a title interest based on a reserved water right cannot overcome the clear statement rule. It is settled law that the United States may not invade the State's traditional authority over waters absent a clear statement of intent by Congress. After all, "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States," *Gregory*, 501 U.S. at 460, and thus "does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001). For that reason, this Court does not interpret a statute to "alter the 'usual constitutional balance between the States and the Federal Government'" unless Congress made "its intention to do so unmistakably clear in the language of the statute," *Gregory*, 501 U.S. at 460 (quotation omitted), that is "plain to anyone reading", *id.* at 467, through a "clear and manifest statement," *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

ANILCA does not meet that standard. It makes no mention of navigable waters or reserved water rights, let alone explicitly allow NPS to assert jurisdiction over State waters. And its definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States" does not clearly include navigable waters because Alaska owns the submerged lands below its navigable waters, and the United States does not hold title to the waters themselves. *Sturgeon*, 136 S. Ct. at 1067-69. Congress knows how to include a clear statement like this when it wishes to. *Compare, e.g.*, 16 U.S.C. §251n(a)(1) (Olympic National Park includes "all submerged lands and waters of Lake Ozette, Washington, and the Ozette River, Washington.").

Indeed, several provisions of ANILCA undermine the assertion of federal authority over Alaska's navigable waters. Congress excluded navigable waters from the definition of "public lands" by specifically exempting all "lands ... granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). This includes title to and ownership of the land underlying its navigable waters, which passed to Alaska under the Submerged Lands Act. *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995) (citing 43 U.S.C. § 1311(a)). Non-public lands were then excluded from CSUs, as this Court held, and rendered off limits to park regulation through Section 103(c). *Sturgeon*, 136 S. Ct. at 1070-71. Section 1319, furthermore, provides that ANILCA shall not be construed "as expanding or diminishing Federal or State jurisdiction, responsibilities, interests, or rights in water resources, development, or control." 16 U.S.C. § 3207(2). If this law includes a clear statement, it is one that negates a federal claim of title to Alaska's waterways.

Title VIII of ANILCA eliminates any doubt. Unique among ANILCA's titles, Title VIII has its own preamble, which states that its purpose is to continue the goals of the Alaska Native Claims Settlement Act. 16 U.S.C. § 3111(4). It is likewise the only section where Congress invokes its Commerce Clause authority "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." *Id.* That Congress did not invoke its commerce powers anywhere else in the statute should be decisive here. If Congress had intended the statute to grant NPS ownership or regulatory rights beyond the narrow subsistence setting, ANILCA would not provide that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in [Title VIII] of this Act*, or to amend the Alaska constitution" and that "[e]xcept as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." 16 U.S.C. § 3202(a)-(b) (emphasis added).[2] The Ninth Circuit's ruling deprives these provisions of force and effect.

---

2. For these reasons, the Ninth Circuit's application of the reserved water rights doctrine in its *Katie John* subsistence decisions had at least some foothold in the statute. In granting review, then, the Court need not overturn or otherwise address the issue of subsistence management regulation in Alaska. Title VIII supports an array of subsistence management regulations that are beyond the scope of Mr. Sturgeon's challenge. The focus of Mr. Sturgeon's challenge is instead the Ninth Circuit's decision to expand the reasoning of the *Katie John* cases beyond subsistence and, in so doing, grant NPS plenary control over State waterways.

Third, the hovercraft ban exceeds the scope of whatever reserved water rights the United States might hold in the Nation River. The doctrine is premised on the need for actual use and withdrawal of water; it arises where Congress sets aside land for a federal purpose and that purpose would be "entirely defeated" without the reserved water. When the Court has inferred the existence of such a reservation, it therefore involved a specific need either to exclude others from appropriating water that feeds a federal land or to use a limited volume of water to serve federal land. *See, e.g., Cappaert*, 426 U.S. at 136-38; *Arizona v. California*, 373 U.S. 546, 596-99 (1963). No decision of this Court has held that reserved water rights grant the federal government plenary power over any body of water.

Yet the Ninth Circuit did so. Because protection of fish is one of ANILCA's purposes, according to the Ninth Circuit, any diminution of water within the Yukon-Charley "would necessarily impact this purpose, giving rise to a reserved water right." App. 18a. But under this Court's decisions, that determination would (at most) grant NPS the power to prevent others from appropriating and thus reducing water in a manner that endangers fish. It would not provide a basis for banning hovercraft from operating on waterways the United States does not own. NPS never even sought to establish that "the purposes of the [water] reservation would be entirely defeated" without the ban. *New Mexico*, 438 U.S. at 700. That is likely because there is neither any claim of water scarcity within ANILCA's CSUs, *Katie John III*, 720 F.3d at 1238, nor, in any event, an indication in ANILCA that its primary purposes would be defeated without a specified quantity of water.

In sum, cases like *Cappaert* set the outer limit on the authority the United States may assert under the reserved water rights doctrine. The ruling below exceeds those bounds. As the concurrence conceded, "[a] reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose," and "[t]his case has nothing to do with that." App. 20a.[3] Where reservation of water is not necessary to fulfill the federal purpose, the United States must acquire the waterway from the State—even if seizing control over it would be "beneficial in the administration and public use of the national parks and monuments." *New Mexico*, 438 U.S. at 702-03. Congress has wisely seen fit to appropriate NPS funds for just such purposes, *id.* (citing 16 U.S.C. § 17j-2 (1976)), and ANILCA authorizes NPS to purchase Alaskan lands, 16 U.S.C. § 3103(c); *id.* § 3192. Such statutory authorizations would be superfluous if Congress, as the Ninth Circuit concluded, had implicitly granted NPS plenary regulatory

---

3. The concurrence would uphold the hovercraft ban directly under the Commerce Clause. App. 20a-23a (Nguyen, J., concurring). Congress does possess "significant authority to regulate activities" in navigable waters "by virtue of" its "dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power." *Alaska v. United States*, 545 U.S. 75, 116-17 (2005) (Scalia, J., concurring in part and dissenting in part). But that authority is for Congress to invoke. Federal agencies possess only the power Congress delegates to them. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014) In ANILCA, Congress invoked its Commerce Clause power only for purposes of authorizing subsistence regulation. The concurrence was therefore wrong to suggest that "ANILCA expressly left in place federal jurisdiction to regulate the navigable waters." App. 21a-22a. ANILCA did just the opposite—it cabined NPS control over non-federal navigable waters in Alaska and limited NPS commerce authority to subsistence.

authority over non-federal navigable waterways in Alaska based on reserved water rights.[4]

B. NPS's remaining alternative arguments are meritless.

In remanding this case, the Court noted that NPS had offered three alternative arguments in defense of the hovercraft ban. *Sturgeon*, 136 S. Ct. at 1072. The Ninth Circuit incorrectly seized on NPS's reserved water rights argument to affirm. But the other two arguments are no stronger and, if accepted, would be equally destructive of Alaska's sovereignty. Having remanded the case and given the Ninth Circuit the chance to pass on these arguments, the Court is now positioned to definitively resolve this important dispute.

First, NPS incorrectly argues that Section 100751(b) of its Organic Act authorizes the agency to ban hovercraft on the Nation River even if it is not public land. This Court has already held that ANILCA deprives NPS of authority over non-public Alaska land and water. This later specific statute trumps any general authority NPS may have been granted over navigable waters under its Organic Act. "[A] specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

---

4. If anyone holds title, it is the State of Alaska. *California*, 436 U.S. at 40 ("the Submerged Lands Act transferred 'title to and ownership of' the submerged lands and waters.") (quoting 43 U.S.C. § 1311(a)). Because defeating the United States' title claim is sufficient to resolve this dispute, the Court need not reach this issue. But given its indisputable ownership of the land submerged beneath the Nation River, the State at a minimum has a *superior* title claim to the waters themselves.

Second, NPS incorrectly argues that even if Section 103(c) were applicable, the hovercraft ban would still be valid because it extends to both public lands and non-public lands within CSUs and therefore is not "applicable solely to public lands within such units." 16 U.S.C. § 3103(c); *see also Sturgeon*, 136 S. Ct. at 1072. The argument is circular and would render Section 103(c) meaningless.

Allowing NPS to indiscriminately manage public and non-public lands via the same regulations cannot be reconciled with Congress's conscious choice to differentiate between two crucially different categories of land. It also would allow NPS to dictate the extent of its own authority: the agency could regulate non-public Alaska land simply by extending the regulation to public land.[5] It defies logic, contravenes Congress's expressed intent, and overrides this Court's ruling to interpret Section 103(c) to somehow create a loophole under which NPS could evade any limit on its authority merely by extending a regulation to both federal and non-federal lands. NPS should not be allowed to nullify Section 103(c) by violating it.

---

5. In passing, the Ninth Circuit may have endorsed this view by noting the requirement that NPS analyze private lands when creating CSU management plans. App. 8a (citing 16 U.S.C. § 3197(b)(7)). But this Section only instructs NPS to analyze how activity on private land impacts public land within CSUs and it focuses on forming cooperative agreements. ANILCA contains no authorization for NPS to regulate private land as public land. If NPS wants to regulate private land, it must acquire it. 16 U.S.C. § 3192.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

DOUGLAS POPE
POPE & KATCHER
421 West First Avenue, Suite 220
Anchorage, AK 99501

MATTHEW T. FINDLEY
Counsel of Record
EVA R. GARDNER
ASHBURN & MASON, P.C.
1227 West Ninth Avenue, Suite 200
Anchorage, AK 99501
(907) 276-4331
matt@anchorlaw.com

Attorneys for Petitioner

Date: January 2, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 2, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Argued and Submitted October 25, 2016,
Seattle, Washington; Filed October 2, 2017,

No. 13-36165

JOHN STURGEON,

Plaintiff-Appellant,

v.

HERBERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE; GREG DUDGEON; ANDEE SEARS; RYAN ZINKE, SECRETARY OF THE INTERIOR; MICHAEL REYNOLDS, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE NATIONAL PARK SERVICE; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Jerome Farris, Dorothy W. Nelson, and Jacqueline H. Nguyen, Circuit Judges.

Concurrence by Judge Nguyen.

Appendix A

OPINION

NGUYEN, Circuit Judge:

John Sturgeon would like to use his hovercraft in a national preserve to reach moose hunting grounds. The State of Alaska is fine with that;[1] the federal government is not. Sturgeon's case turns on which entity—state or federal—gets to decide the matter. On remand from the Supreme Court, we again conclude that the federal government properly exercised its authority to regulate hovercraft use on the rivers within conservation system units in Alaska.

I.

A.

The Yukon-Charley Rivers National Preserve conservation system unit ("Yukon-Charley") is among the 104 million acres of land in Alaska set aside for

1. The State of Alaska was previously a party to the litigation in the district court and in this court. In our prior opinion, we held that Alaska lacked standing, vacated the district court's judgment as to the State, and remanded with instructions to dismiss the State for lack of jurisdiction. *Sturgeon v. Masica*, 768 F.3d 1066, 1075 (9th Cir. 2014). Alaska did not seek Supreme Court review of that holding, and the district court amended its judgment to dismiss Alaska for lack of jurisdiction. That judgment being final, it is unaffected by the Supreme Court's vacatur of our prior opinion, *Sturgeon v. Frost*, 136 S. Ct. 1061, 194 L. Ed. 2d 108 (2016). We have considered Alaska's supplemental briefing along with that submitted by the other amici curiae and the remaining parties.

preservation purposes by the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3101 *et seq.* (1980). Like other conservation system units created by ANILCA, Yukon-Charley was drawn around a mix of federal, state, Native Corporation, and private owners.

Within the boundaries of the Yukon-Charley lies a stretch of the Nation River. Sturgeon would like to travel by hovercraft on this part of the river to get to moose hunting grounds located upstream from the preserve. Park Service regulations prohibit the use of hovercraft within "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System . . . without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. § 1.2(a)(3); *see id.* § 2.17(e). Alaska permits hovercraft on its waterways. Sturgeon contends that the Nation River belongs to Alaska and that the Park Service has no authority to regulate it. He seeks declaratory and injunctive relief preventing the Park Service from enforcing its hovercraft ban.

B.

ANILCA balanced the need to protect "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" with the need to provide "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Thus, while ANILCA provided that conservation system units in Alaska generally "shall be administered . . . under the laws governing the administration of [National Park Service system unit]

lands," *id.* § 410hh, it "specified that the Park Service could not prohibit on those lands certain activities of particular importance to Alaskans." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1066, 194 L. Ed. 2d 108 (2016). For example, Park Service regulations applicable nationwide prohibit hunting and snowmobiling for the most part, *see* 36 C.F.R. §§ 2.2, 2.18, whereas ANILCA permits, subject to reasonable regulations, "the use of snowmachines . . . for travel to and from villages and homesites," 16 U.S.C. § 3170(a), and "the taking of . . . wildlife for sport purposes and subsistence uses," *id.* § 3201.

II.

"Section 103(c) of ANILCA . . . addresses the scope of the Park Service's authority over lands within the boundaries of conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067. It provides as follows:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. *No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.* If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any

> such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c) (emphasis added). The parties dispute the meaning of section 103(c) and in particular what it means to "be subject to the regulations applicable solely to public lands within such units."

The key to understanding section 103(c) is the difference between "Federal lands" and "public lands." ANILCA defines "public lands" as "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. *Id.* § 3102(3). Similarly, "Federal land" is defined as "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). Simply put, Federal lands include land selections made by Alaska and Native Corporations but not yet transferred to them. Public lands do not. These land selections, while still formally belonging to the federal government, are not to be regulated as part of conservation system units.

The first sentence of section 103(c) establishes that the land selections by Alaska and Native Corporations are not "deemed to be included as a portion of such unit[s]" because that distinction belongs "[o]nly" to "public lands." Both the first and third sentences refer to public lands as being "a portion of" or "part of" the conservation system units in Alaska. This is distinct from lands that are merely "within such units," a phrase used in the second sentence as shorthand for lands "within the boundaries of" such

units but not necessarily a part of them. Land "within such units" includes public lands, the land selections, and non-federal lands. *See, e.g.*, Solid Waste Sites in Units of the National Park System, 59 Fed. Reg. 65,948, 65,949 (Dec. 22, 1994) ("[T]he phrase 'within the boundaries' is commonly employed to refer to both Federal land and nonfederally owned land or interests in land within the outer boundaries [of] a [National Park System] unit.").

The confusion in the second sentence stems from the awkward placement of "within such units." The phrase is not modified by "solely." *See Sturgeon*, 136 S. Ct. at 1070. Rather, it modifies "applicable." Thus, "regulations applicable solely to public lands within such units" means regulations applicable within such units solely to *public* lands—as opposed to *Federal* lands. In other words: regulations that apply only to lands that are deemed part of the units themselves. Outside Alaska, all federally owned lands within conservation system units are deemed part of the unit. *See* 54 U.S.C. § 100501. "Alaska is different." *Sturgeon*, 136 S. Ct. at 1070.

The import of the second sentence is that Federal lands within conservation system units that have been transferred to a non-federal party—like Federal lands that have been selected for state or tribal use—are not "subject to" regulations specific to the conservation system units.[2] Regulations applicable solely to public lands

2. We previously upheld as reasonable an agency determination that certain regulations specific to Alaska units applied to land selections as well as Federal lands. *See John v. United States* (*Katie John III*), 720 F.3d 1214, 1244-45 (9th Cir. 2013) (construing

include Park Service regulations applicable nationwide and Alaska-specific regulations found in ANILCA.[3] These contrast with regulations of general applicability, such as the Clean Air Act, that also affect non-public lands located within such units, such as the land selections and private lands.

Section 103(c) directly responds to the controversy that "Congress . . . stepped in to settle" when it enacted ANILCA. *Sturgeon*, 136 S. Ct. at 1066. Many Alaskans "were concerned that . . . new monuments [designated by President Carter] would be subject to restrictive federal regulations." *Id.* at 1065-66. By exempting Federal lands selected for state or tribal use from being regulated as a part of the unit, ANILCA serves one of its stated goals of providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).

---

36 C.F.R. § 242.4(2)). The basis for this holding was the apparently "inconsistent" directive in section 906(o)(2) of ANILCA: "Until conveyed, all Federal lands within the boundaries of a conservation system unit . . . shall be administered in accordance with the laws applicable to such unit." 43 U.S.C. § 1635(o)(2). Subsection (o), however, concerns land withdrawals—not land selections—and it expressly does not apply to those subsections of § 1635 pertaining to land selections. *See id.* § 1635(o)(1). Regardless, *Katie John III* acknowledged that "[s]ection 102 of ANILCA expressly excludes selected-but-not-yet-conveyed lands from the definition of 'public lands.'" *Katie John III*, 720 F.3d at 1243.

3. Of course, Park Service regulations applicable to conservation system units nationwide may be modified by Alaska-specific regulations. *See* 36 C.F.R. § 13.2(a).

Of course, regulation by the Park Service serves ANILCA's other goal of providing "sufficient protection for the national interest in the scenic, natural, cultural and environmental values." *Id.* But that goal is expressly limited to "public lands" in Alaska. *Id.* Land that is transferred to or selected for non-federal entities is generally not subject to the regulation of conservation system units. However, non-public land is still subject to such regulation if the United States retains an interest in it because the land is public to the extent of the interest.[4] That is clear from ANILCA's definition of "land" as "lands, waters, *and interests therein*." *Id.* § 3102(1) (emphasis added).

ANILCA recognizes that the federal government retains an interest in at least some otherwise non-public lands. It directs the Secretary of the Interior to "develop and transmit to . . . Congress a conservation and management plan for each of the units of the National Park System established or [expanded] by [ANILCA]." *Id.* § 3191(a). One component of the plan is a description of any privately-owned areas within the unit, their purposes, the actual or anticipated activities in the privately-owned areas, the effects of such activities on the unit, and "methods (such as cooperative agreements and *issuance or enforcement of regulations*) of controlling the use of such

4. The parties disagree about the Park Service's authority to regulate lands to and in which the United States has no title or interest by enacting regulations that apply to public and non-public land alike. We need not decide whether such a regulation would be enforceable on non-public land on the ground that it is not "applicable solely to public lands." 16 U.S.C. § 3103(c).

activities to carry out the policies of [ANILCA] and the purposes for which such unit is established or expanded." *Id.* § 3191(b)(7)(E) (emphasis added). Congress plainly expected that the Park Service could issue regulations governing conservation system units that would affect privately-owned lands.

III.

The hovercraft ban "do[es] not apply on non-federally owned lands and waters . . . located within National Park System boundaries," 36 C.F.R. § 1.2(b), except, as relevant here, on "[w]aters subject to the jurisdiction of the United States," *id.* § 1.2(a)(3), and on "[o]ther . . . waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest," *id.* § 1.2(a)(5). The question is whether the Nation River is subject to the jurisdiction or an interest of the United States such that it is public land that the Park Service is authorized to regulate.

A.

Before Alaska gained statehood, the Submerged Lands Act "release[d] and relinquishe[d] unto [the] States . . . all right, title, and interest of the United States" to "the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters." 43 U.S.C. § 1311(a)-(b). The Alaska Statehood Act secured these rights for Alaska. Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (1958). In addition, Alaska

enjoys similar rights under the equal footing doctrine. *See United States v. Alaska*, 521 U.S. 1, 6, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997). While "the United States can prevent lands beneath navigable waters from passing to a State upon admission to the Union by reserving those lands in federal ownership" for "an appropriate public purpose," *id.* at 33-34; *see also* 43 U.S.C. § 1313(a) (excepting from the Submerged Lands Act "lands expressly retained by . . . the United States when the State entered the Union"), we have held that the Nation River was navigable at statehood and that Alaska took title to the riverbed at that time. *See Alaska v. United States*, 201 F.3d 1154, 1160, 1166 (9th Cir. 2000).

But lands submerged beneath inland waterways are distinct from the waterways themselves.[5] "Ownership [of submerged lands] may not be necessary for federal regulation of navigable waters . . . ." *Alaska*, 521 U.S.

---

5. Sturgeon, suggesting otherwise, quotes the Supreme Court's statement that "the Submerged Lands Act transferred 'title to and ownership of' the submerged lands *and waters*." *United States v. California*, 436 U.S. 32, 40, 98 S. Ct. 1662, 56 L. Ed. 2d 94 (1978) (emphasis added) (quoting 43 U.S.C. § 1311(a)). We do not understand the Supreme Court to have breezily adopted an interpretation of the Submerged Lands Act at odds with the statute's plain meaning. In contrast to ANILCA, which includes "waters" within the definition of "lands," the Submerged Lands Act distinguishes "lands" from the various "waters" lying above them. 43 U.S.C. § 1301(a). *California* involved a dispute over the right to license kelp harvesting, *see* 436 U.S. at 35 n.8; neither "ownership of" nor rights to the waters was at issue. Presumably, the Court used "submerged lands and waters" to refer to submerged lands and water *resources*. *See* 43 U.S.C. § 1301(e) ("The term 'natural resources' includes . . . kelp . . . .").

at 42. Under the Submerged Lands Act, "[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of [submerged] lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. § 1314(a).

We have held that the navigational servitude "is not 'public land' within the meaning of ANILCA" because "the United States does not hold title to the . . . servitude." *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986) (per curiam) (citing *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 627-28, 81 S. Ct. 784, 5 L. Ed. 2d 838 (1961)). We expanded that holding in *Alaska v. Babbitt* (*Katie John I*), deciding that Congress did not intend "to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters" when it enacted ANILCA. 72 F.3d 698, 703 (9th Cir. 1995).

Katie John I analyzed the United States' interest in navigable waters in Alaska under the reserved water rights doctrine. Under this doctrine, when the federal government "withdraws its land from the public domain and reserves it for a federal purpose," the government impliedly "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976). The United States thus "acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Id.*

Whether a federally reserved water right is implicit in a federal reservation of public land depends on whether the government intended to reserve unappropriated water. *Id.* at 139. "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.*

In *Katie John I*, we concluded that "[t]he United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes," including ANILCA, and thereby has "implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations." 72 F.3d at 703 & n.10. This reservation of water rights gave the United States "interests in some navigable waters." *Id.* at 703. We held that ANILCA's "definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Id.* In *John v. United States* (*Katie John II*), we decided without discussion that *Katie John I*'s holding "should not be disturbed or altered." 247 F.3d 1032, 1033 (9th Cir. 2001) (en banc) (per curiam).

In *Katie John III*, we considered regulations implementing Title VIII of ANILCA pertaining to subsistence management on public lands, 36 C.F.R. pt. 242. These regulations "included within the definition of 'public lands'"—and thus applied to—"all navigable and non-navigable water within the outer boundaries of . . . 34 listed land units," including Yukon-Charley. *Katie John III*, 720 F.3d at 1232; *see* 36 C.F.R. § 242.3(c)(28). As

here, it was argued that State-and privately-owned lands located within a conservation s ystem unit, referred to as "inholdings," were not public lands and thus not subject to regulation. *Id.* at 1233.

We upheld the agency's inclusion of waters that lie on inholdings in the definition of public lands. *Id.* We reasoned that water rights impliedly acquired by the United States are not forfeited or conveyed to third parties along with the inholdings. *Id.* Because the water bodies were "actually situated within the boundaries of federal reservations," it was "reasonable to conclude that the United States ha[d] an interest in such waters for the primary purposes of the reservations." *Id.*

B.

We are bound under our *Katie John* precedent to reach a similar conclusion here. To begin with, ANILCA's definition of "public lands" applies throughout the statute. It would be anomalous if we treated the regulation at issue in *Katie John III* regarding the geographic scope of regulations implementing Title VIII, 36 C.F.R. § 242.3, as employing a different construction of "public lands" than applicable elsewhere in ANILCA. The regulation does not define "public lands." By merely referencing the term,[6]

6. The Title VIII regulations "apply on all public lands" within some conservation system units, *id.* § 242.3(b), but "exclud[e] marine waters" within others, *id.* § 242.3(c). Outside of the enumerated conservation system units, Title VIII regulations "apply on all other public lands, other than to the military, U.S. Coast Guard, and Federal Aviation Administration lands that are closed to access by the general public." *Id.* § 242.3(d).

which is defined globally in the statute, the regulation implies that there is but a single definition.

While *Katie John III* involved ANILCA's rural subsistence priority, that was only one of the purposes for which ANILCA reserved lands as conservation system units. *Katie John III* recognized that "water rights may be essential to a purpose of the reservation other than subsistence." 720 F.3d at 1240. Just as important was ANILCA's purpose of "provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." 16 U.S.C. § 3101(d).

Three years before the statute's enactment, President Carter withdrew and reserved the land for Yukon-Charley "for the protection of . . . historical, archeological, biological, [and] geological . . . phenomena" including habitat for "isolated wild populations of Dall sheep, moose, bear, wolf, and other large mammals." Proclamation No. 4626, 43 Fed. Reg. 57,113 (Dec. 5, 1978). In particular, he "reserved all water necessary to the proper care and management of those objects protected by [Yukon-Charley] and for [Yukon-Charley's] proper administration." *Id.* at 57,114. In that vein, Congress specified in section 201 of ANILCA that Yukon-Charley "shall be managed for the following purposes, among others":

> To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, *in its undeveloped natural condition* for public

> benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves . . . .

16 U.S.C. § 410hh(10) (emphasis added).

Consistent with this intent, Congress has authorized the Secretary of the Interior to "prescribe regulations . . . concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. § 100751(b). The Park Service's hovercraft ban, applicable to federally managed conservation areas nationwide, "was adopted pursuant to [§] 100751(b)." *Sturgeon*, 136 S. Ct. at 1067. To be more precise, the hovercraft ban was adopted pursuant to § 100751(b)'s statutory predecessor, which similarly provided the Secretary of the Interior with the authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. § 1a-2(h) (1982).[7] This earlier version was enacted four years before ANILCA. Act to Amend

---

7. The hovercraft ban was implemented in 1983. *See* General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,258 (June 30, 1983). Section 100751(b) took effect in 2014 when Congress added Title 54 to consolidate "provisions relating to the National Park Service and related programs" in "one distinct place." H.R. Rep. No. 113-44, at 2 (2013).

the Administration of the National Park System, Pub. L. No. 94-458, 90 Stat. 1939 (1976). ANILCA specified that it did not in any way affect "any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska," and did not supersede, modify, or repeal "existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto." 16 U.S.C. § 3207(1), (3).

The hovercraft ban is also consistent with Congressional intent. Hovercraft were prohibited "because they provide virtually unlimited access to park areas and introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,258 (June 30, 1983). The hovercraft ban thus serves the purpose of keeping waterways in their "undeveloped natural condition . . . to protect [wildlife] habitat." 16 U.S.C. § 410hh(10).

C.

Sturgeon argues that "[r]eserved water rights are not a 'title' interest." While that is true in a narrow, technical sense, *see Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10, 74 S. Ct. 487, 98 L. Ed. 666 (1954) ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right [in the water itself] . . . ."), by the same logic the State also lacks

a "title" interest in the waters above its riverbeds. Water cannot be owned, *see, e.g.*, 2 Amy K. Kelley, *Waters and Water Rights* § 36.02 (3d ed. 2017) (observing the Supreme Court's impatience "with claims of absolute 'ownership' by *either* [state or federal] government"), but "the right of [water's] use, as it flows along in a body, may become a property right." *Niagara Mohawk Power Corp.*, 347 U.S. at 247 n.10.

The word "title" has many meanings. Equitable title, for example, is a beneficial interest in property. *See, e.g., R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1067 n.6 (9th Cir. 1997) (using the phrases "vested interest" and "equitable title" interchangeably). Thus, "title" to an "interest" in water almost certainly means a vested interest in the water, such as a reserved water right. But even if we were uncertain, *Katie John I* already decided the matter when it held that ANILCA's "definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." 72 F.3d at 704. That could not be so unless title to an interest in Alaska's navigable waters is in the United States. *See* 16 U.S.C. § 3102(1)-(3).

Sturgeon also argues that "[t]he reserved water rights doctrine is premised on the need for actual use and withdrawal of water" and that the Park Service has shown no need for a specific quantity of water because the water in conservation system units is not scarce. *Katie John III* forecloses that argument. There was similarly "no suggestion that any federal reservation along any Alaskan waters risks being turned into a 'barren waste'

. . . , or a substantially diminished pool . . . , or is in any way short of water." 720 F.3d at 1238. For that reason, in determining the geographic scope of the United States' reserved water rights, *Katie John III* "include[d] . . . all the bodies of water on which the United States' reserved rights *could at some point* be enforced—*i.e.*, those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue." *Id.* at 1231 (emphasis added). Here, one of the reservation's primary purposes is to protect fish. The diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right.

Sturgeon points out that some 18 million acres within ANILCA-established conservation system units, approximately one-sixth of the total, are land selections for Native Corporations. He worries that federal regulation of navigable waters within the units will result in "economic catastrophe" to native shareholders by "impeding any efforts . . . to productively utilize their lands." Even if true, that is not at issue in this case. Sturgeon lacks standing to assert hypothetical claims on the Native Corporations' behalf. In any event, "Congress clearly did not state in ANILCA that subsistence uses are always more important than . . . other uses of federal lands; rather, it expressly declared that preservation of subsistence resources is *a* public interest and established a framework for reconciliation, where possible, of competing public interests." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545-46, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987). Should Sturgeon's concerns materialize, they can be resolved in an appropriate case.

Appendix A

IV.

ANILCA section 103(c) does not limit the Park Service from applying the hovercraft ban on the Nation River in Yukon-Charley because, under our *Katie John* precedent, the United States has an implied reservation of water rights, rendering the river public lands. Therefore, the district court's order granting summary judgment to defendants is

AFFIRMED.

Appendix A

CONCUR

NGUYEN, Circuit Judge, with whom Circuit Judge NELSON joins, concurring:

We are bound by our *Katie John* decisions to analyze this case under the reserved water doctrine. That is unfortunate. A reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose. *See John v. United States* (*Katie John III*), 720 F.3d 1214, 1226 (9th Cir. 2013) ("[A]pplications of the federal reserved water rights doctrine have focused on the amount of water needed for a specific federal reservation, rather than the locations of water sources that might generally be needed . . . ."). This case has nothing to do with that. Rather, it is about the right to regulate navigation on navigable waters within an Alaska national preserve. That is a Commerce Clause interest and should be analyzed as such.

Alaska v. Babbitt (*Katie John I*), 72 F.3d 698 (9th Cir. 1995), expressed two concerns with analyzing regulatory issues under the navigational servitude or, more generally, the Commerce Clause. One concern was that by treating the federal government's power to regulate under the Commerce Clause as an interest in water, we render ANILCA's definition of Federal lands meaningless because the United States cannot have "title to" such an interest. 72 F.3d at 704. But that is no less true of the United States' ability to have "title to" a reserved water right. *See John v. United States* (*Katie John II*), 247 F.3d 1032, 1047 (9th Cir. 2001) (Kozinski, J., dissenting) ("[A] usufructuary

right does not give the United States *title* to the waters or the lands beneath those waters."). And treating either interest—a navigational servitude or a reserved water right—as a property interest to which the United States holds title is a reasonable interpretation of the statute. The Supreme Court has referred to navigable waters as "the public property of the nation" insofar as "[t]he power to regulate commerce comprehends [federal] control for that purpose, and to the extent necessary." *United States v. Rands*, 389 U.S. 121, 123, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967) (quoting *Gilman v. City of Philadelphia*, 70 U.S. 713, 724-25, 18 L. Ed. 96 (1865)).

Katie John I's textual concern misses a larger point: even if the federal interest in navigable waters under the Commerce Clause is not a property right at all, it is a power "paramount to . . . proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources [of] the respective States." 43 U.S.C. § 1314(a); *see also New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982) ("Whatever the extent of the State's proprietary interest in the river, the pre-eminent authority to regulate . . . resides with the Federal Government."). The proper exercise of the Commerce Clause power is "not an invasion of any private property rights in the stream or the lands underlying it." *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 708, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987) (quoting *Rands*, 389 U.S. at 123). Thus, whether the navigational servitude is "public land" or not is irrelevant. ANILCA expressly left in place federal jurisdiction to regulate the

navigable waters. *See* 16 U.S.C. § 3207 ("Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or . . . as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control . . . .").

Katie John I's other concern was that reliance on the Commerce Clause would allow "a complete assertion of federal control" over "all [navigable] waters in Alaska." 72 F.3d at 704. But the United States' power to regulate activity within the sphere of federal interests on navigable waters is not an exclusive right. States may regulate their waterways to the extent their regulations do not conflict with federal ones. *See Barber v. Hawaii*, 42 F.3d 1185, 1191 (9th Cir. 1994) ("The purpose of [the Submerged Lands Act] was not for the Federal Government to retain exclusive jurisdiction over navigation of the waters above the submerged lands, but for the Federal Government to retain concurrent jurisdiction over those waters."); *see also Courtney v. Goltz*, 736 F.3d 1152, 1160 (9th Cir. 2013) (holding that states may regulate business franchises on navigable waters so long as they do not "encroach on the federal commerce power").

Although *Katie John I* purported to eschew the Commerce Clause as a source of federal regulatory power, it conceded that the reserved water rights doctrine originates in part in the Commerce Clause. 72 F.3d at 703 (citing *Cappaert v. United States*, 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976)). In fact, the doctrine arises solely from the Commerce Clause insofar as

Alaska's navigable waters are concerned. The doctrine's other source, the Property Clause, merely "permits federal regulation of federal lands." *Cappaert*, 426 U.S. at 138 (citing U.S. Const. art. IV, § 3). Alaska's navigable waters are not federal lands in the usual (non-ANILCA) sense because the riverbeds by default now belong to Alaska. It is the Commerce Clause that "permits federal regulation of navigable streams" regardless of who owns the land beneath. *Id.* (citing U.S. Const. art. I, § 8).

Katie John I described its own holding as "inherently unsatisfactory." 72 F.3d at 704. We have since criticized it as a "problematic solution to a complex problem, in that it sanctioned the use of a doctrine ill-fitted to determining which Alaskan waters are 'public lands.'" *Katie John III*, 720 F.3d at 1245. I could not agree more.

I would adopt the well-reasoned approach set forth in Judge Tallman's concurrence to *Katie John II*. Rather than continuing to shove a square peg into a hole we acknowledge is round, we should embrace a Commerce Clause rationale for federal regulation of Alaska's navigable waters.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

D.C. No. 3:11-cv-00183-HRH
District of Alaska,
Anchorage

Appendix B

ORDER

Before: FARRIS, D.W. NELSON, and NGUYEN, Circuit Judges.

Judge Farris, Nelson, and Nguyen have voted to deny the petitions for panel rehearing filed by Plaintiff-Appellant John Sturgeon and Plaintiff-Intervenor State of Alaska. Judge Nguyen has voted to deny the petitions for rehearing *en banc* filed by Sturgeon and the State of Alaska, and Judges Farris and Nelson so recommend.

The full court has been advised of the petitions, and no judge of the court has requested a vote on the petitions for rehearing *en banc*. Fed. R. App. P. 35.

The petitions for rehearing and rehearing *en banc* are DENIED.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

D.C. No. 3:11-cv-00183-HRH

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appendix C

No. 13-36166

D.C. No. 3:11-cv-00183-HRH

STATE OF ALASKA,

Intervenor-Plaintiff-Appellant,

and

JOHN STURGEON,

Plaintiff,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Senior District Judge, Presiding

August 12, 2014, Argued and Submitted,
Anchorage, Alaska

Appendix C

October 6, 2014, Filed

Before: Jerome Farris, Dorothy W. Nelson, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Standing / National Park Service

The panel affirmed the district court's summary judgment in favor of federal appellees, and vacated the judgment against intervenor/appellant State of Alaska, due to its lack of standing, in an action brought by John Sturgeon challenging the National Park Service's enforcement of a regulation banning the operation of hovercrafts on the Nation River.

Tha National Park Service ("NPS") ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that Sturgeon established Article III standing. The panel also held that the federal appellees waived their prudential standing arguments. The panel further held that the State of Alaska lacked standing to challenge the NPS regulations. The panel vacated the district court's judgment as to Alaska, and remanded with instructions that Alaska's case be dismissed for lack of jurisdiction.

The panel rejected Sturgeon's contention that § 103(c) of the Alaska National Interest Lands Conservation Act precluded NPS from regulating activities on state-owned lands and navigable waters that fell within the boundaries of National Park System units in Alaska. The panel held that Sturgeon's interpretation of § 103(c) was foreclosed by the plain text of the statute. The panel held that even assuming that the waters of and lands beneath the Nation River had been "conveyed to the State" for purposes of the Alaska National Interest Lands Conservation Act § 103(c), NPS's hovercraft ban was not a regulation that applied solely to public lands within conservation system units in Alaska; and given its general applicability, the regulation could be enforced on both public and nonpublic lands alike within conservation system units.

The panel also rejected Sturgeon's arguments that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue, and that her action raised serious constitutional concerns.

Appendix C

OPINION

NGUYEN, Circuit Judge:

John Sturgeon ("Sturgeon") challenges the National Park Service's ("NPS") enforcement of a regulation banning the operation of hovercrafts on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

Sturgeon and Alaska present the same legal argument: § 103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA") precludes NPS from regulating activities on state-owned lands and navigable waters that fall within the boundaries of National Park System units in Alaska. The district court granted summary judgment in favor of the federal appellees. Because we find that Sturgeon's interpretation of § 103(c) is foreclosed by the plain text of the statute, we affirm as to Sturgeon. We hold that Alaska lacks standing to bring this challenge, and thus vacate and remand with instructions that Alaska's case be dismissed.

Appendix C

I.

The facts are straightforward and largely undisputed. Since 1971, Sturgeon has hunted moose on an annual basis on the Nation River.[1] The lower six miles of the Nation River lie within the Yukon-Charley Rivers National Preserve ("Yukon-Charley"), which is a unit of the National Park System. In 1990, Sturgeon purchased a small, personal hovercraft, which he used on his hunting excursions. In September 2007, while repairing his hovercraft on a gravel bar adjoining the river, Sturgeon was approached by three NPS law enforcement employees. They informed him that NPS regulations prohibited the operation of hovercrafts within the Yukon-Charley and issued him a verbal warning. Sturgeon protested that the NPS regulations were inapplicable because he was operating his hovercraft on a state-owned navigable river. Sturgeon contacted his attorney via satellite phone, who in turn contacted Andee Sears, a Regional Law Enforcement Specialist with NPS. Sears told Sturgeon's attorney that the hovercraft must be removed from the Yukon-Charley. Sturgeon complied.

---

1. The Nation River is a tributary of the Yukon River. While Sturgeon's complaint also mentions his hunting excursions on the Yukon River, part of which also falls within the Yukon-Charley Rivers National Preserve, he failed to raise a separate claim for the Yukon River. Thus, the district court found that only the applicability of the regulation to the Nation River was before the court. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *6 (D. Alaska Oct. 30, 2013). Sturgeon does not challenge that finding on appeal.

Later, Sturgeon followed up with Sears over the phone and met with him in Anchorage. Sears advised Sturgeon that even though Alaska might own the submerged land beneath the river, the hovercraft ban was nonetheless in force within the boundaries of the Yukon-Charley. Sears warned Sturgeon that he risked criminal liability if he operated his hovercraft within the Yukon-Charley. In response to these warnings, Sturgeon refrained from using his hovercraft during the 2008 to 2010 moose hunting seasons and has not been able to hunt on the portions of the Nation River that fall within the boundaries of the Yukon-Charley.

Although Sturgeon sent a letter to then-Secretary of the Interior, Ken Salazar, petitioning for repeal or amendment of the NPS regulations restricting his access to navigable waters located within national park boundaries, he did not receive a response. He then sued in federal district court, seeking an order declaring that NPS's regulations violated ANILCA, as applied to him on state-owned lands and waters, and enjoining the federal defendants from enforcing these regulations.

Alaska intervened, raising the same argument that the application and enforcement of NPS regulations on state-owned lands and waters violated ANILCA. Specifically, Alaska challenged NPS regulations that required employees of the Alaska Department of Fish and Game to obtain a scientific research and collecting permit before engaging in genetic sampling of chum and sockeye salmon on the Alagnak River. These regulations purportedly harmed Alaska "in the form of increased

staff time and expense in complying with NPS procedures and in the form of delays in implementing the project." Alaska further argued that NPS's actions both interfered with its sovereign right to manage and regulate its lands and waters and chilled its citizens' ability to enjoy the rights and benefits flowing from its management of state resources.

On summary judgment, the district court ruled in favor of the federal appellees. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *9 (D. Alaska Oct. 30, 2013). The district court found that Sturgeon's and Alaska's interpretation of ANILCA § 103(c) lacks support in the plain language of the statute. 2013 U.S. Dist. LEXIS 157078, [WL] at *8-*9. This appeal followed.

II.

We review questions of law resolved on summary judgment de novo, and the district court's factual findings for clear error. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 976 (9th Cir. 2012).

III.

As an initial matter, the federal appellees contend that we lack jurisdiction over this appeal because Sturgeon and Alaska have failed to establish standing. Even though the federal appellees did not present these arguments to the district court below, they may nonetheless do so for the first time on appeal. The constitutional requirements for

standing under Article III are jurisdictional, cannot be waived by any party, and may be considered sua sponte. *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009). The oft-repeated "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "First, the plaintiff must have suffered an 'injury in fact,'" which is both concrete and particularized, as well as actual or imminent. *Id.* "Second, there must be a causal connection between the injury and the conduct complained of," meaning that the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (quotation mark and alterations omitted)). Third, it must be likely that a favorable decision would redress the injury identified. *Id.* at 561.

Apart from these constitutional concerns, "there exists a body of 'judicially self-imposed limits on the exercise of federal jurisdiction'" that forms the prudential standing doctrine. *Cnty. of Kern*, 581 F.3d at 845 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)); *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289-90, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). Because these considerations are nonconstitutional in nature, they may be deemed waived if not previously raised before the district court. *Cnty. of Kern*, 581 F.3d at 845.

Appendix C

A.

We find that Sturgeon has established standing. The federal appellees argue that Sturgeon has failed to show probable or imminent enforcement of the NPS regulations to meet the first requirement of an injury-in-fact. The federal appellees' view, however, cannot be reconciled with the Supreme Court's recent decision in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014), where the Court emphasized that *threatened* enforcement actions may suffice to create Article III injuries. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* at 2342. Thus, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

Sturgeon has satisfied the injury-in-fact requirement. He has alleged an intention to use his hovercraft, and has contacted both NPS and the Department of the Interior regarding the applicability and enforcement of the regulation to his hovercraft use. Sturgeon's inability to use his hovercraft for moose-hunting purposes arguably implicates his right under the Privileges or Immunities Clause of the Fourteenth Amendment "to use the navigable waters of the United States, however they may penetrate the territory of the several States."

The Slaughter-House Cases, 83 U.S. 36, 79, 21 L. Ed. 394 (1872); *see also Courtney v. Goltz*, 736 F.3d 1152, 1160 (9th Cir. 2013) (interpreting the Privileges or Immunities Clause to encompass "a right to *navigate* the navigable waters of the United States"). Sturgeon thus alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298).

Further, there is no dispute that his intended conduct is proscribed by NPS regulation. *See* 36 C.F.R. § 2.17(e) (stating that "[t]he operation or use of hovercraft is prohibited" within NPS-administered lands and waters, which include the Yukon-Charley). Finally, "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298). The federal appellees concede that Sturgeon received a verbal warning not to use the hovercraft, that Special Agent Sears told Sturgeon's lawyer that Sturgeon "should remove the hovercraft from the preserve," and that Sears later indicated that Sturgeon "[might] be subject to criminal liability if he operated a hovercraft in the preserve."[2] These facts are sufficient to show a credible threat of enforcement against Sturgeon.

Next, the federal appellees argue that any injury-in-fact identified by Sturgeon is not "fairly traceable" to actions of NPS. We disagree. The regulation was promulgated by NPS and enforcement has been

2. Indeed, if Sturgeon violated NPS's hovercraft ban, he would risk incurring a fine and imprisonment for up to six months. *See* 36 C.F.R. § 1.3(a).

threatened by NPS employees. Therefore, Sturgeon's injuries are "fairly traceable" to actions of NPS. Finally, a favorable decision would redress Sturgeon's identified injury-in-fact, and the federal appellees do not contend otherwise.

In addition to contending that Sturgeon lacks Article III standing, the federal appellees argue that prudential considerations of ripeness and adverseness militate against a finding of standing. However, the federal appellees failed to raise these arguments before the district court. We thus find them waived, as prudential standing arguments "can be deemed waived if not raised in the district court" due to their nonconstitutional nature.[3] *Cnty. of Kern*, 581 F.3d at 845 (quoting *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993)) (internal quotation marks omitted).

B.

The State of Alaska, on the other hand, lacks standing. Alaska offers three bases to support its standing: (1) harm "in the form of increased staff time and expense" in obtaining and complying with the terms of a scientific research and collecting permit; (2) injuries to Alaska's sovereign right to control its lands and waters; and (3) the Secretary of the Interior's denial of its petition for

3. Moreover, it may be that the "Article III standing and ripeness issues in this case 'boil down to the same question'"—namely, whether a sufficient injury-in-fact exists to render the case ripe. *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)).

administrative proceedings that would repeal or amend the regulations at issue. We address each of the proffered bases in turn.

With regard to Alaska's chum and sockeye salmon study, the increased burdens to Alaska as a result of NPS's permit requirement clearly constitute injuries-in-fact. It is undisputed that NPS employees informed Alaska's Department of Fish and Game ("DFG") that a scientific research and collecting permit was required before it engaged in the study. The scientific research and collecting permit that DFG actually obtained and the General Conditions and Park Specific Guidance that accompanied it—all of which are part of the record—demonstrate that DFG was forced to comply with numerous obligations and limitations under the terms of the permit. To name just a few, DFG was not allowed to destroy research specimens without NPS's prior authorization, was obligated to catalogue collected specimens into NPS's Interior Collections Management System and label such specimens with NPS accession and catalog numbers, and was required to submit an Investigator's Annual Report and copies of other final reports and publications resulting from the study within a year of publication. The record thus amply supports Alaska's allegation of harm in the form of increased staff time and expense.

But while Alaska may have suffered cognizable injuries, a favorable ruling would not redress these injuries. Alaska's complaint sought a declaration that the NPS regulations were invalid and void as applied to state-owned lands and waters and an injunction barring future

enforcement of the regulations on state-owned lands and waters. Such relief would not remedy injuries relating to DFG's chum and sockeye salmon study in 2010, which have already been incurred and suffered. At oral argument, Alaska represented that DFG's chum and sockeye salmon study is complete, and the record offers no indication that related studies or efforts are pending or forthcoming. In the absence of evidence showing how the requested relief would redress its identified injuries, Alaska may not rely on activities relating to the 2010 study of chum and sockeye salmon to establish standing. *Cf. Lujan*, 504 U.S. at 564 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." (alteration in original) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)) (internal quotation marks omitted).

The second basis proffered by Alaska presents a closer question. Alaska argues that the NPS regulations violate its "sovereign[] " and "proprietary interests" in its lands and waters, and interfere with its "authority and ability to manage its property in accordance with the Alaska Constitution and state law." States certainly possess sovereign and proprietary interests that may be pursued via litigation. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); *see also, Pennsylvania v. New Jersey*, 426 U.S. 660, 665, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976) ("It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated . . . ."). However, we conclude

that Alaska's arguments are unavailing for purposes of establishing standing under the circumstances of this case.

To begin with, Alaska failed to meet the requirement that its purported injuries be "actual or imminent." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)) (internal quotation mark omitted). Because Alaska did not identify any actual conflict between NPS's regulations and its own statutes and regulations, we are left with only a vague idea of how exactly NPS's permitting requirement infringes on the state's sovereign and proprietary interests in its lands and waters, or how the requirement interferes with the state's control over and management of those lands and waters. In the absence of such a conflict, Alaska's purported injuries are too "conjectural or hypothetical" to constitute injuries-in-fact. *Id.* (quoting *Whitmore*, 495 U.S. at 155) (internal quotation marks omitted).

Alaska has cited no case that finds standing based simply on purported violations of a state's sovereign rights. Rather, evidence of actual injury is still required. For example, in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), the Supreme Court found that Massachusetts had standing to challenge the EPA's denial of a rulemaking petition requesting regulation of greenhouse gas emissions under the Clean Air Act. *Id.* at 510-11, 526. The Court noted that the state was due "special solicitude in [the] standing analysis" based on two factors: (1) Massachusetts sought to vindicate a procedural right, which eliminated the need under Article

III to demonstrate redressability and immediacy, and (2) Massachusetts's status as a "sovereign State." *Id.* at 517-20; *see also Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1144-45 (9th Cir. 2013) (distinguishing *Massachusetts v. EPA*). Even in light of this special solicitude, however, the Court specifically found that "[b]ecause the Commonwealth 'own[ed] a substantial portion of the state's coastal property,' it ha[d] alleged a particularized injury in its capacity as a landowner" due to rising global sea levels. *Massachusetts*, 549 U.S. at 522 (citation omitted).

Similarly, in *Oregon v. Legal Services Corp.*, 552 F.3d 965 (9th Cir. 2009), Oregon contended that a private, nonprofit corporation established by the United States to provide federal funds to local legal assistance programs "thwart[ed] [its] efforts at policy making with regards to Oregon's Legal Service Program." *Id.* at 973. We rejected Oregon's claim because "there [was] no dispute over Oregon's ability to regulate its legal services program, and no claim that Oregon's laws ha[d] been invalidated as a result of the [corporation's] restrictions." *Id.* Because Oregon was able "to regulate its legal service programs as it desire[d]," there was thus "no judicially cognizable injury." *Id.* at 974.

Finally, *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990), is also illustrative. Nevada challenged the Bureau of Land Management's decision to grant a right-of-way over state-owned land to the Department of Energy. *Id.* at 855. Because Nevada's complaint was "silent as to how [the Bureau's] alleged violations . . . resulted in injury to Nevada," in the absence of demonstrated injury, its claim

"'constitute[d] a generalized grievance that the [Bureau] [was] not acting in . . . accordance' with federal laws" and was thus "insufficient to demonstrate standing." *Id.* at 856-57 (first, third, and fourth alterations added, second alteration in original) (quoting *Nevada v. Burford*, 708 F. Supp. 289, 295 (D. Nev. 1989)). *See also Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 883 (9th Cir. 2001) (finding no injury-in-fact where twenty Native American tribes challenged a Master Settlement Agreement between Philip Morris, Inc. and forty-six states, five territories, and the District of Columbia because the tribes identified no tribal regulations or contracts that would be affected by the Agreement).

Similarly, here, Alaska's claims regarding its sovereign and proprietary interests lack grounding in a demonstrated injury. While Alaska alleges that NPS regulations "have directly interfered with Alaska's ability as a sovereign to manage and regulate its land and waters," Alaska identifies no conflict between NPS regulations and its own state statutes and regulations.[4]

---

4. Alaska also alleges that the NPS regulations have had "a chilling effect" on Alaskans' use and enjoyment of state-owned lands and waters. But "a state does not have standing 'to protect her citizens from the operation of federal statutes.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)). And "the State must articulate an interest apart from the interests of particular private parties." *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)) (internal quotation mark omitted). Alaska has failed to do so.

Any injury to Alaska's sovereign and proprietary interest is pure conjecture and thus insufficient to establish standing.

The third and final basis upon which Alaska relies to establish standing is the Secretary of the Interior's denial of its petition for new administrative proceedings. A plaintiff possesses standing to enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8. As discussed above, Alaska fails to identify any "threatened concrete interest." Alaska cannot rely on the Secretary's denial of its petition because "[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements." *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433, 351 U.S. App. D.C. 344 (D.C. Cir. 2002) (quoting *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27, 349 U.S. App. D.C. 347 (D.C. Cir. 2002)) (internal quotation marks omitted). Alaska's "right to petition the agency does not in turn 'automatic[ally]' confer Article III standing when that right is deprived." *Id.* (alteration in original) (quoting Pet'rs' Br.).

Therefore, we hold that Alaska has failed to establish standing to challenge the NPS regulations. We vacate the district court's judgment as to Alaska and remand with instructions that Alaska's case be dismissed for lack of jurisdiction.

Appendix C

IV.

We now turn to the merits of Sturgeon's challenge. Sturgeon contends that § 103(c) of ANILCA bars the application and enforcement of NPS's hovercraft ban on the Nation River,[5] which he contends is state-owned land. According to Sturgeon, the plain text of the statute, its legislative history, and our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), support his view. Before explaining why we find Sturgeon's contentions unpersuasive, we offer a bit of background.

A.

ANILCA, enacted in 1980, offered new "protection[s] for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provide[d] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Summarized succinctly, "ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes." *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1165 (9th Cir. 2008). To this end, Congress "set aside approximately 105 million acres

5. Many of Sturgeon's arguments resemble a facial challenge to NPS's general regulatory authority over nonfederal land within conservation system units. However, the district court's finding that Sturgeon had pleaded an as-applied challenge, *Sturgeon*, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *1, is not contested on appeal, and we therefore limit our consideration to the regulation as applied to Sturgeon.

of federal land in Alaska for protection of natural resource values by permanent federal ownership and management." *Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 827-28 (D. Alaska 1984). Portions of those lands were used to expand existing units of the National Park System and create new units, which were to be administered by the Secretary of the Interior. 16 U.S.C. § 410hh; *id.* § 410hh-1. Such units included national parks, preserves, and monuments. See 16 U.S.C. § 410hh; *id.* § 410hh-1. ANILCA refers to units of the National Park System situated in Alaska as "conservation system unit[s]" ("CSUs"). 16 U.S.C. § 3102(4).

Not all lands that lie within the boundaries of a CSU are owned by the federal government. Where possible, Congress drew unit boundaries "to include whole ecosystems and to follow natural features," and was thus cognizant of the fact that state, Native, or private-owned land could fall within the boundaries of CSUs. *Marsh*, 749 F.2d at 1417 (quoting 125 Cong. Rec. 9905 (1979)). The presence of both federal-owned and nonfederal-owned land lying within CSUs led Congress to clarify two things: first, what land would actually comprise the CSUs, and second, more generally, how land falling within a CSU's boundaries—whether federally owned or not—could be regulated. *See id.* (discussing the House version of ANILCA and the "Tsongas substitute" in the Senate).

Such clarification came in ANILCA § 103(c). The full text of that subsection reads as follows:

Appendix C

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Section 103(c) thus contains three separate instructions regarding the composition and regulation of CSUs. First, only "public lands" lying within the boundaries of a CSU are "deemed to be included as a portion of such unit." *Id.* Under ANILCA, "public lands" are "[f]ederal lands" (including "lands, waters, and interests therein") in which the United States holds title after December 2, 1980. *Id.* § 3102(1)-(3). The first sentence of § 103(c) makes clear that the boundaries of CSUs "do[] not in any way change the status of that State, native, or private land" lying within those boundaries. 125 Cong. Rec. 11158 (1979).

The second sentence of § 103(c) declares that state, Native, and private-owned land shall not be subject to

"regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Accordingly, under § 103(c)'s plain text, only public land lying within a CSU's boundaries may be subjected to *CSU-specific regulations*—nonfederal land is expressly made exempt from such regulations. As the 1979 Senate Report on ANILCA makes clear, nonfederal land would not be "subject to the management regulations which may be adopted to manage and administer any national [CSU] *which is adjacent to, or surrounds, the private or non-federal public lands*." S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247 (emphasis added). Importantly for purposes of this case, in contrast to CSU-specific regulations, "[f]ederal laws and regulations of general applicability to both private and public lands" are "unaffected," and "would be applicable to private or non-federal public land holdings within [CSUs]." *Id.*

Finally, § 103(c)'s third sentence provides that the Secretary of the Interior may acquire nonfederal land lying within a CSU's boundaries; such land would then "become part of the unit" and may "be administered accordingly." 16 U.S.C. § 3103(c). Once acquired, what was previously nonfederal land would no longer be free from "regulations applicable solely to public lands within [CSUs]." *Id.*; *see also* 126 Cong. Rec. 21882 (1980) (noting that "if the [Native-]corporations ever decide to dispose of their property, [it] could become part of the [CSU]").

B.

With this background in mind, we easily resolve Sturgeon's appeal. Sturgeon argues that the plain language of ANILCA § 103(c) removes nonfederal lands from the reach of federal regulations promulgated to manage public lands. Thus, his argument goes, NPS may not enforce the hovercraft ban on the lower portion of the Nation River that falls within the Yukon-Charley because the water and submerged land of that river is owned by the state of Alaska.

While we agree with Sturgeon that § 103(c) is unambiguous, we find that it unambiguously forecloses his interpretation. The plain text of s§ 103(c) only exempts nonfederal land from "regulations applicable ***solely*** to public lands within [CSUs]." 16 U.S.C. § 3103(c) (emphasis added). The regulation at issue, banning hovercraft use in the Yukon-Charley, is not so limited.

In 1976, Congress vested the Secretary of the Interior with the authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. § 1a-2(h). Pursuant to this grant of authority, the Secretary promulgated a number of regulations to "provide for the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service." 36 C.F.R. § 1.1(a). Within the chapter of the Code of Federal Regulations

containing those regulations, parts 1 through 5 "apply to all persons entering, using, visiting, or otherwise within" federally owned lands and waters administered by NPS and "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters." 36 C.F.R. § 1.2(a)(1), (3). The hovercraft ban is located within part 2 of that chapter. *See* 36 C.F.R. § 2.17(e).

In short, then, the hovercraft ban is not one that "appli[es] solely to public lands within [CSUs]" in Alaska. 16 U.S.C. § 3103(c). Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks. Thus, even assuming (without deciding) that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue. Because of its general applicability, the regulation may be enforced on both public and nonpublic lands alike within CSUs. Though Sturgeon might prefer a more robust regulatory exemption, we "must presume that a legislature says in a statute what it means and means in a statute what it says." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)).[6]

---

6. Because we resolve this case based on the plain text of the statute, we need not address whether our decisions in *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013), *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en

C.

Sturgeon acknowledges that § 103(c)'s language exempts nonfederal lands from regulations applicable "solely" to public lands, but argues that overreliance on the word "solely" leads to a result contrary to the express legislative purpose of restricting federal authority over nonfederal land within CSUs. "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n. 29, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); *see also Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 653 (9th Cir. 2009) (quoting *North Dakota v. United States*, 460 U.S. 300, 312, 103 S. Ct. 1095, 75 L. Ed. 2d 77 (1983)) (internal quotation mark omitted) (stating that when statutory language is clear, its "language must ordinarily be regarded as conclusive"). But even if we consider the legislative history of ANILCA, we find no support for Sturgeon's claim. Rather, the legislative records from the House and Senate contain numerous statements supporting the plain language of the statute. The sponsor of § 103(c) in the House offered the view that his amendment "restate[d] and ma[de] clear" that nonfederal lands within CSUs would not be "subject to regulations which are applied to public lands which, in fact, are part of the unit." 125 Cong. Rec. 11158 (1979). The primary sponsor of ANILCA in the House declared that nonfederal land would not be constrained by "regulations applicable

---

banc) (per curiam), or *State of Alaska v. Babbitt (Katie John I)*, 72 F.3d 698 (9th Cir. 1995) supply an alternative basis for affirming the district court.

to the public lands within the specific conservation system unit." 125 Cong. Rec. 9905 (1979). The House Concurrent Resolution that added § 103(c) to ANILCA specified that "only public lands (and not State or private lands) are to be subject to the [CSU] regulations applying to public lands." 126 Cong. Rec. 30498 (1980). Finally, the Senate Report notes that § 103(c) would exempt nonfederal land from "regulations which may be adopted to manage and administer any [CSU] which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247.[7] Rather than help Sturgeon, the legislative history confirms that ANILCA § 103(c) did not purport to exempt nonfederal lands within CSUs from generally applicable federal laws and regulations like the hovercraft ban.

D.

Next, Sturgeon argues that our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), supports his interpretation. Sturgeon's reliance on *Marsh*, however, is misplaced. *Marsh* involved the interaction between

---

7. Sturgeon also claims that until 1996, NPS did not purport to have regulatory authority over state-owned lands and waters within CSUs, but in July 1996, NPS reversed course. Even if so, NPS's current view comports with the text of the statute, and to the extent Sturgeon believes that NPS's purported change in position militates against deference, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

two subsections of ANILCA § 503. The first, § 503(b), established the Admiralty Island National Monument, which was composed of 921,000 acres "of public lands." *Id.* at 1416 (emphasis omitted) (quoting ANILCA, Pub. L. No. 96-487, § 503(b), 94 Stat. 2371 (1980)). The second, § 503(d), stated that "[w]ithin the Monument[], the Secretary shall not permit the sale of [sic] harvesting of timber." *Id.*

Reading these two subsections in conjunction, we held that the district court erred in finding that "all lands within the boundaries of a National Forest System Monument"—including private lands—"come within the harvesting prohibition of section 503(d)." *Id.* (emphasis omitted). We pointed out that under § 503(b), the Admiralty Island National Monument, "by definition, consists solely of public or federally owned lands." *Id.* Thus, § 503(d)'s use of the phrase "[w]ithin the Monument" was inapplicable "to *private lands* which are within the boundaries of a national forest conservation system unit." *Id.* (emphasis added and omitted).

Marsh clearly is inapposite to the present dispute. First, *Marsh*'s discussion of § 103(c) is largely dicta because that subsection was inapplicable to the timber harvesting ban at issue. While ANILCA § 103(c) refers to "regulations applicable solely to public lands within such units," § 503(d) imposes a statutory prohibition against timber harvesting. At most, *Marsh* drew inferences from § 103(c) for the purpose of determining the reach of § 503(d). *See id.* at 1418 (noting that the court examined sections 102, 103(c), 503(d), and 506(c) "harmoniously" to determine Congressional intent regarding the ban

on timber harvesting). Second, *Marsh* offers little guidance in Sturgeon's case because, if promulgated as a regulation, § 503(d)'s ban on timber harvesting would fall under § 103(c)'s exception to the application of regulations applying solely to public lands, while NPS's hovercraft ban does not. Section 503(d) specifically refers to activities taking place "[w]ithin the Monument[]," and thus only limits conduct taking place on public lands within a specific CSU. For that reason, if promulgated as an agency regulation, its harvesting ban would qualify as a "regulation[] applicable solely to public lands within [CSUs]," and would be unenforceable on state, Native, or private-owned land under ANILCA § 103(c). As we noted above, NPS's hovercraft ban is not so constrained, and it applies to federally owned lands and waters administered by NPS nationwide, as well as navigable waters within national parks.

V.

We reject two additional arguments asserted by Sturgeon, that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue and that her action raises serious constitutional concerns.

A.

The 1976 Park Service Administration and Improvement Act ("1976 Act") grants the Secretary of the Interior broad authority over boating and water-related activities within the National Park System. That authorization provides as follows:

Appendix C

> [T]he Secretary of the Interior is authorized . . . [to] [p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: *Provided*, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h). Sturgeon contends that the latter portion of this subsection restricts the Secretary's regulatory power and does not permit her to regulate any and all activities on waters within national parks.

However, the plain text of the 1976 Act merely requires that any regulations promulgated by the Secretary *complement*, and not *derogate*, Coast Guard authority over waters subject to federal jurisdiction. It does not, as Sturgeon argues, limit the Secretary's regulatory authority to that enjoyed by the Coast Guard. The Oxford English Dictionary defines "complement" to mean "to supply what is wanting," 3 *Oxford English Dictionary* 610 (2d ed. 1989), and "derogate" to mean to "diminish," *id.* at 504. Thus, under the 1976 Act, the Secretary may regulate boating and other water-related activities taking place within the National Park System and its navigable

waters so long as those regulations supplement and do not diminish the Coast Guard's authority.[8]

Indeed, the legislative history of the 1976 Act makes this clear. The concern regarding the regulatory authority of the Coast Guard was first raised by the Secretary of the Interior in a letter to the House Committee on Interior and Insular Affairs.[9] H.R. Rep. No. 94-1569, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4299. The Secretary noted that the Coast Guard possessed existing authority to "promulgate and enforce regulations for the promotion of *safety of life and property on* . . . waters subject to the jurisdiction of the United States." *Id.* (alteration in original) (emphasis added) (quoting 14 U.S.C. § 2(3)). Because many waters within the National Park System were navigable, the Secretary noted that his agency would "exercise authority concurrent with the Coast Guard in

---

8. Moreover, ANILCA § 1319 provides that "[n]othing in [the statute] shall be construed as . . . superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to . . . *exercise licensing or regulatory functions in relation thereto.*" 16 U.S.C. § 3207 (emphasis added).

9. The Secretary of Transportation also submitted a letter to the House Committee "strongly object[ing]" to the fact that the bill as drafted "would authorize the Secretary of the Interior to promulgate and enforce boating regulations which relate to construction, performance, and equipment standards"—responsibility for which had been previously delegated to "the Secretary of the department in which the Coast Guard is operating." H.R. Rep. No. 94-1569, at 24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4310.

many instances," and thus recommended an amendment clarifying that the bill's grant of regulatory authority would "not diminish the Coast Guard's authority under existing law to regulate boat design and safety." *Id.* The remainder of the bill would still, however, grant her the authority "to regulate ***recreational, commercial and other uses and activities*** relating to all waters of the National Park System." *Id.* (emphasis added).

The statute reflects just such a clarifying amendment. *See* 16 U.S.C. § 1a-2(h). Thus, both the plain text and the legislative history of the 1976 Act make clear that Sturgeon's argument that the Secretary of the Interior exceeded her statutory authority is without merit.

B.

Finally, Sturgeon contends that the Secretary's exercise of her regulatory authority under the 1976 Act implicates "serious constitutional concerns." Specifically, he raises the specter of potential violations of the Property and Commerce Clauses, though without offering any specifics as to how or why the NPS regulations contravene those clauses. We therefore decline to invalidate NPS's hovercraft ban on constitutional grounds because "[w]hatever the extent of the State's proprietary interest in [its] river[s], the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government." ***New England Power Co. v. New Hampshire***, 455 U.S. 331, 338 n.6, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982); ***see also Alaska v. United States***, 545 U.S. 75, 116-17, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005)

(Scalia, J., concurring in part and dissenting in part) ("If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power.").

VI.

We hold that even assuming that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of ANILCA § 103(c), NPS's hovercraft ban is not a regulation that applies solely to public lands within CSUs in Alaska. Therefore, as to Sturgeon, we affirm the district court's grant of summary judgment in favor of the federal appellees. Because Alaska cannot establish standing on this record, we vacate the district court's judgment as to Alaska and remand with instructions that Alaska's action be dismissed for lack of subject matter jurisdiction.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

APPENDIX D — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED OCTOBER 30, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN STURGEON,

Plaintiff,

and

STATE OF ALASKA,

Plaintiff-Intervenor,

vs.

SUE MASICA, *et al.*,

Defendants.

No. 3:11-cv-0183-HRH

DECISION

I. Procedural History.

In this action brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06, plaintiff John Sturgeon and plaintiff-intervenor the State of Alaska bring "as applied" challenges to National Park Service ("NPS") regulations. Sturgeon and the State have timely filed their

opening summary judgment briefs,[1] to which defendants have responded.[2] Sturgeon and the State timely filed their reply briefs[3] and defendants[4] have timely filed their surreply[5] as contemplated by the court's scheduling order.[6] Oral argument has been heard.

On September 14, 2011, Sturgeon commenced this action. In Count I of his complaint, he seeks a declaration that the application of NPS regulations on lands belonging to the State of Alaska that are within NPS conservation system units created or expanded by the Alaska Native Lands Conservation Act (herein "ANILCA") are void as applied to him.[7] In Count II of his complaint, Sturgeon seeks a declaration that "any regulations purporting to authorize the NPS to enforce regulations which are solely applicable to public lands within conservation units on lands owned by the State of Alaska, including navigable waters, within NPS conservation units created or

---

1. Docket Nos. 77 & 81.

2. Docket No. 84.

3. Docket Nos. 97 & 98.

4. Defendants are Sue Masica, Greg Dudgeon, Andee Sears, Jonathan Jarvis, the National Park Service, Sally Jewel, and the United States Department of the Interior.

5. Docket No. 101.

6. Docket No. 74 at 2.

7. Complaint for Declaratory Judgment and Injunctive Relief at 14-15, ¶ 46, Docket No. 1.

expanded by ANILCA are void."[8] In Count III, Sturgeon requests an order enjoining defendants "from interfering with [his] operation of his hovercraft on state-owned navigable waters within the Yukon-Charley" Rivers National Preserve (herein "Yukon-Charley").[9] In Count IV, he requests an order enjoining defendants "from enforcing NPS regulations, which are solely applicable to public lands within federal conservation system units, on lands belonging to the State of Alaska, including navigable waters, within the boundaries of NPS conservation units in Alaska that were created or expanded by ANILCA."[10]

In its second amended complaint in intervention,[11] the State asserted four claims for relief. The State's first claim for relief was a facial challenge to the regulations in question.[12] In its second claim for relief, the State seeks a declaration that the application and enforcement of 36 C. F. R § 1.2(a)(3) and § 13.2 violates § 103(c) of ANILCA.[13] In its third claim for relief, the State seeks a declaration that the Secretary's denial of the State's petition for rule-making was arbitrary and capricious.[14] In its fourth claim for relief, the State seeks injunctive relief prohibiting the

8. Id. at 16, ¶ 51.

9. Id. at 17, ¶ 55.

10. Id. at 18-19, ¶ 60.

11. Docket No. 45.

12. Id. at 15, ¶¶ 56-57.

13. Id. at 15, ¶¶ 58-59.

14. Id. at 15, ¶¶ 60-63.

application and enforcement of the regulations in question on State-owned lands and waters.[15]

By order of September 19, 2012,[16] the court rejected the State's first claim for relief which was a facial challenge to the NPS regulations at issue here because that claim was time-barred. Defendants now contend that both Sturgeon and the State are in fact bringing facial challenges in the guise of an "as-applied" challenge. Sturgeon and the State have pled as-applied challenges. The facts upon which Sturgeon and the State rely demonstrate application of NPS regulations to the respective activities of Sturgeon and the State. The court will address the as-applied claims.

In their briefing to the court, the State and defendants briefly discuss whether or not the State is challenging 36 C. F. R. § 13.2.[17] The court finds no evidence in the record that the defendants applied 36 C. F. R. § 13.2 to the State. As discussed hereinafter, the principal issue here is the applicability of 36 C. F. R. § 1.2 (which regulation addresses the applicability of Title 36, Part 2, as well as 36 C. F. R. Part 13 regulations) to the conduct of Sturgeon and the State.

---

15. Id. at 15, ¶¶ 64-65.

16. Docket No. 53.

17. 36 C. F. R. § 13.2 addresses the applicability and scope of the Part 13 regulations which have application to NPS units in Alaska.

Appendix D

II. Statutory/Regulatory Background.

A. Alaska Native Claims Settlement Act.

In 1971, Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") for purposes of addressing and resolving outstanding aboriginal claims of Native Alaskans which began to accrue in 1867 when the United States purchased Russian-America (Alaska). In addition to a monetary settlement and the conveyance of some 40 million acres of land to be divided amongst 220 Native villages and 12 regional corporations, ANCSA created the joint Federal-State Land Use Planning Commission for Alaska[18] and, by § 17(d)(2)(A), made provision for the withdrawal from public domain 80 million acres of unreserved public lands in Alaska for potential addition to or creation of new units of the national parks, forests, wildlife refuges, and wild and scenic river systems.[19]

B. Alaska National Interest Lands Conservation Act.

Based upon the work of the Commission, Congress in 1980 enacted ANILCA. In furtherance of the ANCSA § 17(d)(2)(A) withdrawals, Title II of ANILCA makes provision for the creation of or additions to the NPS. Section 201 established new "units of the National Park

---

18. 43 U.S.C. § 1616. For convenience, we refer in the text of this discussion to ANCSA and ANILCA sections by statutory number, with parallel United States Code sections in a footnote.

19. 43 U.S.C. § 1616(d)(2)(A).

System [which] shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act[.]"[20] Included as a new area was Yukon-Charley, "containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90, 008[.]" § 201(10).[21] Section 201(10) expressly sets forth the purposes for this withdrawal, one of which was the maintenance of the environmental integrity of the Charley River Basin in its undeveloped, natural condition.

Section 202 of ANILCA[22] adds to existing NPS units.[23] Included by § 202(2)[24] is an addition to the Katmai National Monument[25] of 1,037,000 acres of public land, to be known as Katmai National Preserve ["Katmai"]. Katmai is to be administered to protect habitat, including fish populations, and to protect scenic geological, cultural, and recreational features. § 202(2).[26]

---

20. 16 U.S.C. § 410hh.

21. 16 U.S.C. § 410hh(10).

22. 16 U.S.C. § 410hh-1.

23. 16 U.S.C. § 410hh-1.

24. 16 U.S.C. § 410hh-1(2).

25. Renamed Katmai National Park by § 202(2).

26. 16 U.S.C. § 410hh-1(2).

Appendix D

Included in Yukon-Charley are the lower reaches of the Nation River. Included in Katmai is the Alagnak River.[27]

For purposes of the implementation of ANILCA, that act contains definitions which are critical to understanding the act. The key terms are "land," "federal land," and, most important of all, "public lands." "Land" means "lands, waters, and interests therein." § 102(1).[28] "Federal land" means "lands the title to which is in the United States" after the date of enactment of ANILCA. § 102(2).[29] "Public lands" means "land situated in Alaska which, "after the date of enactment of ANILCA are Federal lands, except:

> land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska of the State under any other provision of Federal Law.

§ 102(3)(A).[30] Finally, "conservation system unit" is defined to include the various NPS units addressed by ANILCA. § 102(4).[31] Yukon-Charley and Katmai are conservation system units for purposes of ANILCA.

---

27. The Alagnak River is also designated by § 601(25) as a wild and scenic river within the NPS. 16 U.S.C. § 1274(a)(25).

28. 16 U.S.C. § 3102(1).

29. 16 U.S.C. § 3102(2).

30. 16 U.S.C. § 3102(3)(A).

31. 16 U.S.C. § 3102(4).

Appendix D

Collapsing the foregoing definitions for ease of discussion of the circumstances in this case, "public lands" are waters or interests in waters in Alaska owned by the United States in 1980. Excluded from public lands are interests in land and/or water confirmed or granted to the State of Alaska under any federal law.

Somewhat buried in the "maps" section of ANILCA is § 103(c)[32] which is at the heart of this litigation:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

C. National Park Service Administration Improvement Act and Regulations.

In order to facilitate the administration of the national park system, the Secretary of the

32. 16 U.S.C. § 3103(c).

> Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities:
>
> . . . .
>
> Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h).

Relying upon and in furtherance of the above act, the Secretary of the Interior had adopted by 1997 the following general provision of Title 36 of the Code of Federal Regulations for areas administered by the NPS. Section 1.2[33] provides as follows:

---

33. The parties have discussed at length the history of 36 C. F. R. § 1.2. Because this 1997 regulation is clear and unambiguous, and because the court has before it only as-applied challenges to the NPS regulations, there is no need to delve into the development of § 1.2. It is the interplay between § 1.2 and ANILCA § 103(c) which is critical to a disposition of this case.

Appendix D

Applicability and scope.

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned land sand waters administered by the National Park Service;

. . . .

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or low-lands;

. . . .

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter

> do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

36 C. F. R. § 1.2(a), (b).

Summarizing the foregoing, subsections (a)(1) through (5) of § 1.2 apply to everyone going within the boundaries of all NPS administered lands in the United States. Navigable waters within the boundaries of such lands are subject to regulation, irrespective of ownership of submerged lands.[34]

The Secretary of the Interior has also promulgated 36 C. F. R. Part 13, containing regulations applicable to the NPS units in Alaska. Section 13.2(a) provides:

> The regulations contained in part 13 are prescribed for the proper use and management of park areas in Alaska and supplement the general regulations of this chapter. The general regulations contained in this chapter are applicable except as modified by part 13.

36 C. F. R. § 13.2(a). With respect to park areas, § 13.2(b) provides:

---

34. For reasons explained hereinafter, the provisions of § 1.2(a)(5) do not come into play in this case.

Appendix D

> Subparts A through F contain regulations applicable to park areas. Such regulations amend in part the general regulations contained in this chapter. The regulations in subparts A through F govern use and management, including subsistence activities, within the park areas, except as modified by special park regulations in subparts H through V.

36 C. F. R. § 13.2(b).

In furtherance of his/her general administrative duties, the Secretary of the Interior has promulgated specific regulations which pertain to entries within the boundaries of NPS administered lands using hovercraft or helicopters. Title 36, Code of Federal Regulations, § 2.17(e), provides that "[t]he operation or use of hovercraft is prohibited." Section 2.17(a)(3) provides that the following is prohibited:

> Delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.

36 C. F. R. § 2.17(a)(3).

Part 2 regulations, including § 2.17(a)(3) and (e), are expressly subject to § 1.2(a), as provided by § 1.2(b). Part 13 regulations are also subject to § 1.2(a), as provided by § 1.2(b), except to the extent that Part 13 regulations

modify or amend the general regulations. Sturgeon and the State have not pointed to, and the court does not perceive there to be any amendment of the subparts A through F, Alaska-specific regulations with respect to park areas.[35] Therefore, the regulations specific to the use of helicopters and hovercraft have application within the boundaries of Yukon-Charley and Katmai, including the navigable waters of those NPS administered areas, **unless** Sturgeon and the State are correct in arguing that 36 C. F. R. § 1.2 (and therefore§§ 2.17(a)(3) and (e) and Part 13 as well) does not apply within the boundaries of Yukon-Charley and Katmai because of the provisions of ANILCA § 103(c).[36]

III. Factual Background.

Sturgeon's complaint and the State's second amended complaint in intervention focus upon their respective use of the Nation River and the Alagnak River. The lower reaches of the Nation River are within the boundaries of Yukon-Charley. The upper reaches of the Alagnak River are within the boundaries of Katmai. Both Yukon-Charley and Katmai are national parks created or expanded by ANILCA §§ 201 and 202. The Nation River arises in the

---

35. There are, in subparts H and O, special regulations applicable to the Alagnak River as a wild river and to Katmai National Park and reserve. The Alagnak regulation has to do with bear viewing. 36 C. F. R. § 13.550. The subpart O regulations contain general provisions with respect to fishing, wildlife viewing, firearms, and the use of Lake Camp and Brooks Camp Developed Area. 36 C. F. R. §§ 13.1202-1242.

36. 16 U.S.C. § 3103(c).

Ogilvie Mountains of Yukon Territory, Canada, near the U. S. border, and flows in a southerly direction into Alaska and then into the northeastern quadrant of Yukon-Charley where it ultimately joins the Yukon River. The Alagnak River arises in the Aleutian Range south of Lake Iliamna and flows in a westerly direction through Katmai National Preserve. The Alagnak empties into Kvichak Bay, then into Bristol Bay.

It is undisputed that those portions of the Nation and Alagnak Rivers which are the subject of this litigation are within a conservation system unit as defined by § 102(4) and that both rivers have been determined to be navigable. Because the Nation and Alagnak Rivers are navigable, the State holds title to the lands under the navigable waters in trust for the people of Alaska, "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." Ill. Cent. R. Co. v. State of Ill., 146 U.S. 387, 452, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); Alaska v. United States, 545 U. S. 75, 78-79, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005).[37]

Sturgeon alleges that while he was on a moose hunting trip in 2007, the NPS informed him that he could not use

---

37. "The common-law public trust doctrine has been incorporated into the constitution and statutes of Alaska." State, Dep't of Natural Resources v. Alaska Riverways, Inc., 232 P. 3d 1203, 1211 (Alaska 2010). "The people of the state have a constitutional right to free access to and use of the navigable or public water of the state" and "[t]he state has full power and control of all of the navigable or public water of the state, both meandered and unmeandered[.]" AS § 38. 05. 126(a), (b).

his small personal hovercraft on the Nation River within the boundaries of the Yukon-Charley. Sturgeon alleges that upon returning from his hunting trip, he had phone conversations and met with Andee Sears, a special agent for the NPS, who "reaffirmed the NPS's position that use of a hovercraft within the boundaries of the Yukon-Charley is a crime . . . and warned plaintiff that he would be criminally cited if he ever again operated the hovercraft within the Yukon-Charley".[38] In October 2010, Sturgeon petitioned the NPS "to engage in rule-making to repeal or amend NPS regulations so that the NPS would no longer assert the authority to restrict access on navigable waters located within the boundaries of park areas in Alaska."[39] Sturgeon received no response to his petition.[40] On July 26, 2011, Sturgeon sent a letter to the regional chief ranger of the Alaska district of the NPS, requesting that the chief ranger "confirm in writing whether I will be able to launch in the Yukon or the lower reaches of the Nation with my hovercraft so I can access that part of the Nation upriver from the Yukon-Charley boundary."[41] Sturgeon received no response to this letter.[42]

---

38. Complaint for Declaratory Judgment and Injunctive Relief at 11, ¶ 36, Docket No. 1.

39. Id. at 12, ¶ 40; see also, Exhibit A, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

40. Id. at 13.

41. Exhibit B at 2, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

42. Complaint for Declaratory Judgment and Injunctive Relief at 13, ¶ 41, Docket No. 1.

Appendix D

In 2010, the Alaska Department of Fish and Game was required to apply to defendants for a scientific research and collecting permit to conduct genetic sampling on chum salmon in the Alagnak River.[43] "Access to State lands was to be by helicopter. . . ."[44]

On September 30, 2010, the State petitioned the Secretary of the Interior to repeal or amend § 1.2(a)(3) to make it in applicable to Alaska, with a corresponding repeal of the revisions to 36 C. F. R. § 13.2.[45] The petition was denied on January 13, 2012.[46]

IV. Jurisdiction.

The parties disagree as to whether Sturgeon and the State have standing to bring their as-applied regulatory claims with respect to the Kobuk and Yukon Rivers.[47] Sturgeon mentions the Yukon River in his complaint, but he has not asserted any separate claim based upon the Yukon River; and the NPS regulations that Sturgeon is challenging were applied to him with respect to his use of

---

43. Second Amended Complaint in Intervention [etc.] at 12, ¶ 2b, Docket No. 45.

44. Id. at 13.

45. Id. at 11, ¶ 44.

46. Id. at 11, ¶ 46.

47. Defendants concede that this court has jurisdiction over Sturgeon's claims based on the Nation River and the State's claims based on the Alagnak River. Defendants' Sur-Reply on Motions for Summary Judgment at 4, Docket No. 101.

a hover-craft on the Nation River within Yukon-Charley. Similarly, the State never pled any factual allegations relating to its access to the Kobuk National Park. The court therefore concludes that it is defendants' application of 36 C. F. R. § 1.2 and the related Part 2 regulations to Sturgeon and the State with respect to their operations on the Nation and Alagnak Rivers which is before the court. Claims as to the Kobuk and Yukon Rivers have not been put before the court.

V. Standard of Review.

"Summary judgment is a suitable vehicle for resolution of a challenge to agency action under the Administrative Procedure Act. . . ." Western Watersheds Project v. Salazar, 766 F. Supp. 2d 1095, 1104 (D. Mont. 2011) (citing Nw. Motorcycle Ass'n v. United States Dep't of Agric., 18 F. 3d 1468, 1471-72 (9th Cir. 1994)). "However, unlike the typical civil summary judgment resolution, the [c]ourt does not make findings of fact or determine the existence of genuine issues of material fact." Id. "The [c]ourt must instead review the Administrative Record that was before the federal agency at the time it made its decision to determine whether the record supports the agency's decision. . . ." Id.

"'Because this case involves an administrative agency's construction of a statute that it administers, [the court's] analysis is governed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694. . . .'" Rodriguez v. Smith, 541 F.3d 1180, 1183 (9th Cir. 2008) (quoting Mujahid v.

Daniels, 413 F.3d 991, 997 (9th Cir. 2005)). "Under the Chevron framework" the court "must 'first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear.'" Id. at 1184 (quoting Mujahid, 413 F. 3d at 997). "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron, 467 U. S. at 842-43). "'[I]f the statute is silent or ambiguous with respect to the specific issue,' the court moves to step two of the Chevron inquiry, and considers 'whether the agency's answer is based on a permissible construction of the statute.'" Blandino-Medina v. Holder, 712 F. 3d 1338, 1343 (9th Cir. 2013) (quoting Chevron, 467 U. S. at 843).

VI. Discussion.

Sturgeon and the State argue that the NPS general regulations may not be applied to them because of § 103(c) of ANILCA.[48] They point out that 36 C. F. R. § 1.2 purports to grant the NPS regulatory authority over state-owned navigable waters within the boundaries of Yukon-Charley and Katmai. They contend that § 103(c) of ANILCA forbids the NPS from exercising its regulatory authority over state-owned navigable waters within park boundaries in Alaska.

48. 16 U. S. C § 3103(c).

Appendix D

The first sentence of § 103(c) provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act)shall be deemed to be included as a portion of such unit.[49]

It is clear beyond any room for discussion that the river beds and waters of the Alagnak and Nation Rivers are lands within the boundaries of Yukon-Charley and Katmai, both of which are ANILCA conservation system units. The first sentence of § 103(c) provides that only "public lands" are part of the respective conservation units (Yukon-Charley and Katmai). The State's submerged lands — the beds of the Nation River and the Alagnak River — are owned by the State, not the United States. The river beds are not included in — are not part of — conservation units Yukon-Charley or Katmai.

The State's submerged lands — the beds of the Nation River and the Alagnak River — are not the only interests to be addressed. For purposes of ANILCA, "land" means land or water or interests in them. The State owns "the natural resources within such lands and waters." 43 U.S.C. § 1311(a). The United States is entitled to regulate and improve navigation on navigable waters in furtherance of commerce. United States v. 32.42 Acres of Land in San Diego County, 683 F.3d 1030, 1037 (9th Cir. 2012). However, the federal government's rights as

---

49. 16 U. S. C § 3103(c).

regards navigation is not an interest inland for purposes of ANILCA. Alaska v. Babbitt, 72 F. 3d 698, 702-03 (9th Cir. 1995) ("Katie John I").[50] The Katie John I decision stands for the further proposition that the United States may have reserved water rights with respect to navigable waters within ANILCA conservation units; and where such reserved water rights exist, the United States does own public land for purposes of ANILCA. Id. at 703-04. The State claims to "own" the waters of the Nation and Alagnak Rivers. Defendants contend that the United States owns reserved water rights in the Nation and Alagnak Rivers, thereby making the rivers "public lands" for purposes of ANILCA.

Each of the United States and the State have correlative rights with respect to navigable waters. But we need not decide here which if any of the correlative rights with respect to the navigable waters (as distinguished from submerged lands) of the Nation and Alagnak Rivers are owned by the State or the United States, or whether such interests are or are not public land. The principal issue in this case is whether or not 36 C. F. R. § 1.2(a) (and therefore also § 2.17 and Part 13) applies to the respective operations of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai. The first sentence of § 103(c) does not address that issue.

The second sentence of § 103(c) does address the application of Title 36 regulations. It reads:

---

50. Katie John I "remains controlling law" despite Katie John II. John v. United States, 720 F.3d 1214, 1226 (9th Cir. 2013).

Appendix D

> No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within suchunits.[51]

The parties disagree as to whether the beds of the Nation and Alagnak Rivers, and such other rights as the State may own, were "conveyed to the State." The river beds were not transferred to the State by means of a deed or patent such as the federal government routinely uses in transferring selected lands from public domain to the State. Here, there is no evidence of a conveyance of river beds to the State. However, § 102(3)(A) of ANILCA expressly provides that "lands which have been confirmed to . . . or granted to the Territory of Alaska or the State under any other provision of Federal law" are excluded from "public lands."[52] The State acquired title to the beds of the Nation and Alagnak Rivers under the Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), and the Submerged Lands Act, 43 U.S.C. §§ 1311-15. Because of the State ownership of the river beds, those river beds are not "public lands" for purposes of ANILCA. § 102(3).[53] However, the fact that the beds of the Nation and Alagnak Rivers are not public lands does not answer the question: "Does 36 C. F. R. § 1.2 and the underlying specific regulations of 36 C. F. R. Part 2 or Part 13 nevertheless

---

51. 16 U.S.C. § 3103(c).

52. 16 U. S. C. § 3102(3)(A).

53. 16 U.S.C. § 3102(3).

have application to the activities of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai?" On its face, § 1.2 has application to them because, on the facts of this case, both Sturgeon and the State entered and carried on activities "within. . . [t]he boundaries of federally owned lands and waters administered by the National Park Service. . . ." 36 C. F. R. § 1.2(a). Again, subsection (a) is applicable by the terms of 36 C. F. R. § 1.2(b), and application of § 1.2(a) does not depend upon ANILCA or the State's rights as to navigable waters.

Assuming for the sake of discussion that the beds of the Nation and Alagnak Rivers which the State owns by virtue of the Submerged Lands Act are deemed to have been "conveyed" to the State for purposes of § 103(c) of ANILCA,[54] the second sentence of § 103(c) is dispositive in this case. The regulations which § 103(c) excludes from application to State lands are those "regulations applicable solely to public lands within such units."[55] Title 36, C. F. R. § 1.2, and Part II of Title 36 (including § 2.17)were enacted by the Department of the Interior pursuant to its general authority to adopt regulations for all NPS administered lands and waters. None of those regulations was adopted "solely" to address entry upon or use of various equipment on public lands within ANILCA-created conservation units such as Yukon-Charley and Katmai.

There are regulations contained within Title 36 which have been adopted and are "applicable solely to public

54. 16 U.S.C. § 3103(c).

55. 16 U.S.C. § 3103(c).

lands within [ANILCA units]." 36 C. F. R. § 103(c).[56] Part 13 of Title 36 contains the regulations which are applicable to NPS units in Alaska, including Yukon-Charley and Katmai. The Part 13 regulations "supplement the general regulations. . . ." 36 C. F. R. § 13.2(a). Part 13 regulations might "modify" or "amend" general regulations applicable to park areas. 36 C. F. R. § 13.2(a) and (b). But Part 13 regulations have not altered or amended the helicopter or hovercraft regulations of § 2.17.

It is arguable that Part 13 regulations do not apply to state-owned submerged lands within Yukon-Charley and Katmai because of § 103(c).[57] But the regulations which expressly proscribe the use of hovercraft and helicopters within the boundaries of NPS administered lands are contained in Part 2 of Title 36, not Part 13. The regulations contained in Part 2, and in particular §§ 2.17(e) and 2.17(a)(3) are not regulations applicable solely to public lands within conservation system units. They are regulations of general application across the entirety of the NPS.

The foregoing disposes of Sturgeon's and the State's claims based upon NPS regulations. There remains the State's third claim for relief by which the State seeks review of the defendants' denial of its petition for rule-making. The State did not present any argument with respect to its third claim in its opening brief. Defendants contend that the claim has been abandoned. The State

---

56. 16 U.S.C. § 3103(c).

57. 16 U.S.C. § 3103(c).

contends that it addressed this claim because, if the challenged regulations are invalid, then it was arbitrary and capricious of the defendants to deny the State's petition for rule-making. Inasmuch as defendants have prevailed with respect to the application of 36 C. F. R. § 1.2, it follows that the denial of the State's petition for rule-making was not arbitrary or capricious.

VII. Conclusion

The court concludes that 36 C. F. R. § 1.2(a), §§ 2.17(e) and 2.17(a)(3) were properly applied to the respective operations of Sturgeon and the State.

Sturgeon's complaint[58] is dismissed with prejudice. Intervenor the State of Alaska's second amended complaint[59] is dismissed with prejudice. The clerk of court shall enter judgment accordingly.

DATED at Anchorage, Alaska, this 30th day of October, 2013.

/s/ H. Russel Holland
United States District Judge

58. Docket No. 1.

59. Docket No. 45.

APPENDIX E — 16 U.S.C. § 3103

16 U.S.C. § 3103

§ 3103. Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

(b) Changes in land management status; publication in Federal Register; filing; clerical errors; boundary features and adjustments

As soon as practicable after December 2, 1980, a map and legal description of each change in land management status effected by this Act, including the National Wilderness Preservation System, shall be published in the Federal Register and filed with the Speaker of the House of Representatives and the President of the Senate,

and each such description shall have the same force and effect as if included in this Act: *Provided, however,* That correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the office of the Secretary. Whenever possible boundaries shall follow hydrographic divides or embrace other topographic or natural features. Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilderness Preservation, and National Forest Systems and as national conservation areas and national recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.

(c) Lands included within unit; acquisition of land by Secretary

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such

lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

APPENDIX F — 36 C.F.R. § 1.2

36 C.F.R. § 1.2

§ 1.2 Applicability and scope.

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned lands and waters administered by the National Park Service;

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands;

(4) Lands and waters in the environs of the District of Columbia, policed with the approval or concurrence of the head of the agency having jurisdiction or control over such reservations, pursuant to the provisions of the Act of March 17, 1948 (62 Stat. 81);

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent

necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

(c) The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter.

(d) The regulations contained in parts 2 through 5, part 7, and part 13 of this section shall not be construed to prohibit administrative activities conducted by the National Park Service, or its agents, in accordance with approved general management and resource management plans, or in emergency operations involving threats to life, property, or park resources.

(e) The regulations in this chapter are intended to treat a mobility-impaired person using a manual or motorized wheelchair as a pedestrian, and are not intended to restrict the activities of such a person beyond the degree that the activities of a pedestrian are restricted by the same regulations.

APPENDIX G — 36 C.F.R. § 2.17

36 C.F.R. § 2.17

§ 2.17 Aircraft and air delivery.

(a) The following are prohibited:

(1) Operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.

(2) Where a water surface is designated pursuant to paragraph (a)(1) of this section, operating or using aircraft under power on the water within 500 feet of locations designated as swimming beaches, boat docks, piers, or ramps, except as otherwise designated.

(3) Delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.

(b) The provisions of this section, other than paragraph (c) of this section, shall not be applicable to official business of the Federal government, or emergency rescues in accordance with the directions of the superintendent, or to landings due to circumstances beyond the control of the operator.

(c)(1) Except as provided in paragraph (c)(3) of this section, the owners of a downed aircraft shall remove the

aircraft and all component parts thereof in accordance with procedures established by the superintendent. In establishing removal procedures, the superintendent is authorized to: (i) Establish a reasonable date by which aircraft removal operations must be complete; (ii) determine times and means of access to and from the downed aircraft; and (iii) specify the manner or method of removal.

(2) Failure to comply with procedures and conditions established under paragraph (c)(1) of this section is prohibited.

(3) The superintendent may waive the requirements of paragraph (c)(1) of this section or prohibit the removal of downed aircraft, upon a determination that: (i) The removal of downed aircraft would constitute an unacceptable risk to human life; (ii) the removal of a downed aircraft would result in extensive resource damage; or (iii) the removal of a downed aircraft is impracticable or impossible.

(d) The use of aircraft shall be in accordance with regulations of the Federal Aviation Administration. Such regulations are adopted as a part of these regulations.

(e) The operation or use of hovercraft is prohibited.

(f) Violation of the terms and conditions of a permit issued in accordance with this section is prohibited and may result in the suspension or revocation of the permit.